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October Term, 1982

In the

Supreme Court of the United States

No. ___
Mabel Huckaby
Petitioner

V.

United States of America
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "occurrence of any event affecting" language of 42 United States Code §1396h (a) (3) is so vague as to be violative of the due process of law clause of the Fifth Amendment to the United States Constitution.

2. Whether the Indictment states a criminal offense.

3. Whether the standard for determining the "level of care" of nursing home patients under the Arkansas Medicaid Plan, constituted the basis of the Indictment and, if so, whether that underlying standard is so vague as to be violative of the due process of law clause of the Fifth Amendment to the United States Constitution.

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October Term, 1982

In the

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No. ____
Mabel Huckaby
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V.

United States of America
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Mabel Huckaby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, filed December 13, 1982, is attached hereto as Appendix A, *infra*, (p. A1). The January 6, 1983, denial of Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is attached as Appendix B, *infra* (p. A13).

JURISDICTION

The judgment of the Court of Appeals was entered December 13, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied January 6, 1983. This Petition for Certiorari was filed within sixty (60)

days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

FEDERAL STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 42 U.S.C. §1396h (a) (3) (B) states that:

> (a) Whoever—
>
> (3) Having knowledge of the occurrence of any event affecting . . . (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fradulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, . . .
>
> (shall be guilty of a criminal offense).

The Fifth Amendment to the United States Constitution states that:

> No person shall be deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

The Petitioner, Mabel Huckaby, was indicted by the Grand Jury for the Eastern District of Arkansas and charged with ten (10) counts of violating Title 42 U.S.C. §1396h (a) (3). The Indictment is attached as Appendix C, *infra* (pp. A13-20).

The Indictment, in summary form, charged Mrs. Huckaby, a nursing home administrator, with fraudulently concealing and failing to disclose the actual level of care *provided* by Cumberland Lodge Nursing Home, Little Rock, Arkansas to ten (10) Medicaid recipients, who were patients in the nursing home, for the purpose of securing Medicaid payments in a greater amount than was due.

The allegations were that during 1979 nursing homes in Arkansas were to be reimbursed for services provided to Medicaid recipients under the Arkansas Plan according "to the level of care *required* by the particular Medicaid recipient." In order to administer the reimbursement program for nursing homes the Arkansas Division of Social Services, Department of Human Services, classified Medicaid recipients in nursing homes into three categories according to the level of care *required* by the recipient. The categories were (1) skilled care patients; (2) intermediate care patients; and (3) minimum care patients. The categories fixed the amount of money to be reimbursed to a nursing home for the Medicaid patient in question and nursing homes received a greater amount of payments under the Program for Medicaid recipients who required skilled care than for those who required either intermediate or minimum care. The difference in payments for intermediate and minimum care were also on a decreasing scale.

The Office of Long Term Care, Arkansas Division of Social Services, Department of Human Services, received information relating to the classification of Medicaid recipients in nursing homes, classified those patients and

paid claims submitted by the nursing homes for services rendered to those recipients.

Mrs. Huckaby was convicted on each of the ten (10) counts contained in the Indictment on March 16, 1982. Prior to the return of the jury's verdicts, the District Court denied defense motions for judgment of acquittal on eight (8) counts and reserved ruling on the motions for judgment of acquittal as to Counts VI and X of the Indictment.

On May 25, 1982, the date Mrs. Huckaby was sentenced, the District Court granted the motions for judgment of acquittal as to Counts VI and X for the reason that the evidence was insufficient to support the jury verdicts as to those counts.

Mrs. Huckaby appealed from her judgment of conviction on the remaining eight counts of the Indictment and the United States Court of Appeals for the Eighth Circuit affirmed the trial court's judgment.

REASONS FOR GRANTING THE WRIT

Mrs. Huckaby's case presents unique and critical questions which have not been addressed by this Court and for which the various Circuit Court of Appeal are presently without guidance.

I.

THE UNCONSTITUTIONALITY OF THE "OCCURRENCE OF ANY EVENT AFFECTING" LANGUAGE OF 42 U.S.C. §1396h (a) (3).

This issue is one of unusual importance since the Court of Appeals decision below adds a suspect dimension to prosecutions under the penalties provision of the Medicaid Act of 1977.

The gravamen of the offenses charged in this case is that under the Arkansas Medicaid Plan providers of long term care were to be reimbursed in an amount that depended upon the level of care a medicaid recipient *required*. The Arkansas Department of Social Services, who administered the Plan, retained the services of a private physician, Dr. Roy A. Brinkley, to classify all Medicaid recipients as skilled care (class A), intermediate care (class B), or minimum care (class C).

In making such a determination Dr. Brinkley utilized certain criteria or standards attached as Appendix D, *infra*, (pp. 21-22). Dr. Brinkley personally formulated these standards using certain guidelines that were promulgated in federal regulations, some of his "own thoughts", and relied on a particular form identified as Arkansas Social Services Evaluation of Need for Nursing Home Care Form SS-703 that was regularly submitted by each provider for each nursing home patient. An example of the Form is attached as Appendix E, *infra* (pp. A23-24).

The purpose of the 703 Form was to describe, so far as the form permitted, a patient's physical and mental condition. The forms constituted the foundation of the government's proof that Mrs. Huckaby concealed and failed to disclose the actual level of care *provided* by her nursing home to ten (10) Medicaid recipients who were patients in the home.

The patients constituting the ten (10) Counts of the Indictment and a summary of their physical condition at the time in question while in the nursing home is as follows:

Patient	Age	Diagnosis	Prognosis
1.) Grayce Murray	87	ASHD Arthritis Generalized Arteriosclerosis	Poor
2.) Thomas Cassidy	40	Schizophrenia Paranoid Chronic Emphysema	Poor
3.) Glen Morton	61	Diabetes Hypertension	Fair
4.) Mary Welch	67	Acute Bronchitis- Peptic Ulcer Disease, Pulmonary Obstructive Disease	Poor
5.) Catherine Yaniger	89	Cataracts (L) eye Arteriosclerosis-Hypertension	Fair
6.) Johnny Gidron	47	CA (Cancer) Arteriosclerosis, Post Hip Fx (Fracture)	Poor

7.) Lola Turney	72	Phlebotrombosis Cellulitis Hypertension Cardiovascular Disease	Fair
8.) William Moore	65	Emphysema-Seizures COPD (Chronic Obstructive Pulmonary Disease)	Poor
9.) Myrtle Knight	86	Arteriosclerosis DJD (Degenerative Joint Disease) OBS (Organic Brain Syndrome)	Fair
10.) Sreathie Huett	83	Congestive heart failure Bronchitis	Poor

A 703 Form for each patient was submitted to Arkansas Social Services for the purpose of re-classifying these patients from their existing status, i.e., minimum care, to intermediate care.

The jury returned verdicts of guilty on all charges, but the District Court granted a motion to set aside the verdict as to those counts relating to Johnny Gidron and Sreathie Huett.

Mrs. Huckaby attacked §1396h (a) (3) on the ground that, under the circumstances of this case, the "*occurrence of any event affecting*" language under which she was prosecuted is so overly broad and vague as to be unconstitutional. However, the Court of Appeals held that when read as a whole, the statute gives fair warning of the prescribed conduct and is "clearly constitutional" (Appendix A, p. 11).

In so holding, the Court of Appeals has fashioned a decision that imposes upon Mrs. Huckaby, and all others similarly situated, a *duty* to perform an act not imposed by law. The 703 Forms did not require a disclosure of the "actual level of care provided."

The Court of Appeals found that Mrs. Huckaby misrepresented or caused to be misrepresented certain information on the 703 Forms. However, Mrs. Huckaby was not charged with filing false 703 Forms and the only permissible inference that could have been drawn by any misrepresentations, false or otherwise, would be that the patients conditions were not as represented, not that Mrs. Huckaby's nursing home was providing a level of care which was less than what, in Dr. Brinkley's opinion, was required.

Section 1396h (a) (3) contains no provision defining how a person subjected to its terms would determine when a duty would arise to disclose an *event* that might have an affect on that person's continued receipt of benefits. This crucial portion of the statute does not contain words of fixed meaning or made definite by statutory or judicial definition. This fact alone demonstrates that application of the law will in most instances be without fair notice and will vary with the impressions of jurys and judges or the opinions of doctors. The conclusion drawn by the Court of Appeals that the "actual level of care provided" constitutes the "occurrence of an event affecting" the continued right to benefits, clearly demonstrates the breadth that the statute has now been allowed to expand.

A penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" and "a statute which either forbids *or requires* the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law (Emphasis added)." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). In order to be upheld, the criminal statute should employ words or phrases having "a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, or a well-settled common law meaning." *Connally v. General Construction Co., supra.* Also see, *United States v. Cohen Grocery Co.*,

255 U.S. 81 (1920), *Grayned v. City of Rockford*, 408 U.S. 104 (1972), *Lanzeta v. New Jersey*, 306 U.S. 451 (1939), and *Recent Supreme Court Developments Of The Vagueness Doctrine: Four Cases Involving The Vagueness Attack On Statutes During The 1972-1973 Term*, 7 Conn. L. Rev. 94 (1974).

Accordingly, the finding of the Court of Appeals that 42 U.S.C. §1396h (a) (3) is not violative of the due process of law clause of the Fifth Amendment should be reviewed by this Court.

II.

THE INDICTMENT FAILS TO STATE A CRIMINAL OFFENSE.

Under §1396h (a) (3), a federal crime has not been committed unless the Indictment alleges and the government proves the knowing "occurrence of (an) event affecting" the provider's initial or continued right to receive Medicaid payments on behalf of patients.

In the introductory material found in Count I of the Indictment, the grand jury alleges that Medicaid recipients were to be reimbursed according to the level of care "*required*" by the particular Medicaid recipient (Appendix E, *infra*, p. A15). In addition, the Indictment alleges that the amount of money which a nursing home receives under the Arkansas Medicaid Program depends upon the patient classifications (Appendix E, *infra*, p. A15). Finally, the Indictment alleges that Mrs. Huckaby, with intent to defraud the United States of America and the State of Arkansas, "did conceal and fail to disclose the actual level of care *provided* by Cumberland Lodge Nursing Home" to ten (10) Medicaid recipients (Appendix E, *infra*, pp. A16-23).

The Court of Appeals characterized the 703 Forms as documents used to assist Arkansas Social Services in

identifying the "level of care each Medicaid patient *needs*." (Appendix A, *infra*, p. A2). The Court of Appeals also characterized Mrs. Huckaby's attack on the sufficiency of the Indictment as an attempt to restrict §1396h (a) (3) only to the artificially narrow category of cases such as death or the transfer of a patient.

The Petitioner is not attempting to restrict application to only those categories of cases, but the case law would appear to suggest such a restriction. See, e.g., *United States v. Morrison*, 43 FRD 516 (N.D. Ill. 1967) and *United States v. Barrington*, 662 F.2d 1046 (4th Cir. 1981).

The Court of Appeals holding is also inconsistent with those principles enunciated in *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979). The concept "actual level of care provided" must, of its own weight, suggest something that is subject to varied interpretation and change. The Indictment does not allege a circumstance which would constitute the "occurrence of any event affecting" the continuation of benefits and fails to allege that Mrs. Huckaby knew of any such event which would give rise to a duty to disclose. See, *United States v. Zacher*, 586 F.2d 912 (2nd Cir. 1978).

Since the 703 Forms were the only forms required to be filed, and there is no requirement on those forms to report the actual level of care *provided*, there was no failure on Mrs. Huckaby's part to disclose anything. Therefore, the Indictment does not contain allegations within the purview of §1936h (a) (3). Accordingly, the Court of Appeals' conclusion that the Indictment is sufficient should be reviewed by this Court.

III.

THE STANDARDS FOR DETERMINING THE "LEVEL OF CARE" OF NURSING HOME PATIENTS UNDER THE ARKANSAS MEDICAID PLAN PROVIDED THE BASIS FOR

THE INDICTMENT AND THE STANDARDS ARE UNCONSTITUTIONALLY VAGUE.

The issue before the Court is one of extreme importance to the various Circuits. The government prosecuted Mrs. Huckaby for concealing and failing to disclose the actual level of care provided to ten (10) patients in her nursing home. The evidence revealed that a physician, Dr. Roy A. Brinkley, used the information that was supplied in the 703 Forms for those particular patients and certain standards promulgated by the Arkansas Department of Social Services to classify those patients. This type of procedure is utilized in many other jurisdictions and may provide the basis for criminal prosecutions of other nursing home owners and operators.

The Court of Appeals stated that Mrs. Huckaby's attack on the Indictment in this manner, i.e., that vague, ambiguous, uncertain and indefinite standards are incorporated into the Indictment, was "fallacious" (Appendix A, *infra*, p. A10). The Court of Appeals further held that Mrs. Huckaby was "not charged with misapplying the standards." (Appendix A, *infra*, p. A10). Instead, the Court of Appeals stated that Mrs. Huckaby was charged with "putting false information on a form with intent to defraud the government in violation of a federal statute." (Appendix A, *infra*, p. A10). It is interesting to note that one of the government's key witnesses, Betty Johnson, prepared the comments on page two of Appendix E. Even though such comments were consistent with the entries on page one, the Defendant was held to have put false information on page one.

The trial testimony of Dr. Brinkley is attached as Appendix F, *infra*, (pp. A25-181). The criteria or standards utilized by the Arkansas Department of Social Services for determining the "level of care" of nursing home patients under the Arkansas Medicaid Plan is attached as Appendix D, *infra*, (p. A21-22).

The 703 Forms themselves do not, under the facts of this case, exclusively determine the classification that is given to a particular Medicaid recipient. In this case, Dr. Brinkley was solely responsible for exercising the medical judgment necessary to determine the patient's classification. His testimony also demonstrated that his classification is made on the basis of his medical judgment, the 703's, and the Arkansas Social Services standards for determining the three patient classifications. The standards are patently vague, ambiguous, uncertain and indefinite for criminal prosecution purposes. Mrs. Huckaby concedes that she was not charged with misapplying the standards, but this does not change the fact that the standards were utilized by Dr. Brinkley in deciding Mrs. Huckaby's guilt. Dr. Brinkley confirmed this by testifying that "you would have to exercise some judgment as to what was being told you and how to apply it into the criteria that we were using." (Appendix F, *infra*, p. A25-181).

If the government established anything with regard to the submission of the 703 Forms and their relationship to the Arkanas Department of Social Services Medicaid criteria or standards, it proved that Mrs. Huckaby arguably may have provided excessive services to patients.

The Justice Department and Congress experienced a significant amount of difficulty with the intent and meaning of the penalty statutes found in the Medicaid Act of 1977. In 1977, Congress amended §1395 nn (b) and increased the penalties for violations of that statute. Of significance in this case is the fact that Congress completely changed the wording of the statute and attempted to define with greater specificity the crime. The reason for this change was due to the fact that Congress, and many United States Attorneys, felt "that the existing language of these penalty statutes (42 U.S.C. §§1395 nn and 1396h) is unclear and needs clarification." H.R. Rep. No. 95-393 (II, 95th Congress, 1st Sess. 53 (1977), reprinted in U.S. Code Cong. & Admin. News, pp. 3039-3055 (1977); and *United States v. Porter*, supra at p.

1054. Moreover, the legislative history of the Act provides additional insight into the opinion and judgment problems that have consumed this case. While Mrs. Huckaby does not concede that excessive services were furnished to her patients in this case, the following excerpt is helpful to determine Congressional intent regarding the scope of the criminal penalties provision of the Act:

> Furnishing excessive services is probably the most costly *non-criminal* abuse faced by health benefits programs (emphasis added). At the same time, it is relatively difficult to prove and correct. Since the medical needs of a particular patient can be highly judgmental, it is difficult to identify program abuse as a practical manner (sic) unless the over utilization is grossly unreasonable. U.S. Code Cong. Admin. News, 3050 (1977).

The underlying standards for determining the "level of care" of nursing home patients are vague, ambiguous, uncertain and indefinite. Consequently, the charges, which must necessarily adopt the standards, are unconstitutionally vague. Accordingly, the Court of Appeals' conclusion that the Indictment did not incorporate unconstitutionally vague standards should be reviewed by this Court.

CONCLUSION

The decision of the Court of Appeals presents serious questions concerning the constitutionality of the penalties provisions of the Medicaid Act of 1977 and the validity of the Indictment returned against Mrs. Huckaby. Accordingly, this Court should grant Mrs. Huckaby's petition and decide each of the questions presented.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 82-1650

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the Eastern
	*	District of Arkansas.
Mabel Huckaby,	*	
	*	
Appellant.	*	

Submitted: October 15, 1982

Filed: December 13, 1982

Before HEANEY and ROSS, Circuit Judges, and HENLEY, Senior Circuit Judge.

HEANEY, Circuit Judge.

Mabel Huckaby appeals from her convictions on eight counts of violating the Medicaid Act by fraudulently obtaining a greater amount of Medicaid payments than she was due. We affirm.

The Federal Grand Jury for the Eastern District of Arkansas indicted defendant Mabel Huckaby on October 20, 1981. The indictment alleged ten counts of Medicaid fraud in

violation of 42 U.S.C. §1396h (a) (3). [1] Specifically, the indictment charged Huckaby with concealing and failing to disclose the actual level of care that Cumberland Lodge Nursing Home provided to ten Medicaid recipients for the purpose of fraudulently securing Medicaid payments in greater amount than was due. Huckaby pled not guilty at her arraignment, and a jury trial was held on March 9-16, 1982.

Under the Arkansas Medicaid Plan, providers of long term care services to Medicaid recipients (providers) are reimbursed for the reasonable cost of long term care services. The amount of the reimbursement depends upon the level of care the Medicaid recipient requires. Each provider regularly submits a form identified as Arkansas Social Services Evaluation of Need for Nursing Home Care Form SS-703 (703) to assist Arkansas Social Services in identifying the level of care each Medicaid patient needs. Based to a great degree on these forms, Arkansas Social Services classifies recipients as skilled care (class A), intermediate care (class B), or minimum care (class C). A provider receives the most money per patient per day for class A patients, and the least for class C patients. Arkansas Social Services reimburses the providers directly.

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[1] 42 U.S.C. §1396h (a) (3) (i) provided in pertinent part:

(a) Whoever—

* * * *

(3) Having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment * * * conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due * * *

shall (i) in the case of such a * * * concealment [or] failure * * * by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned not more than five years or both[.]

The Cumberland Lodge Nursing Home (Cumberland) was located in Little Rock, Arkansas, and was an authorized provider of long term care services. Appellant Huckaby owned an interest in and participated in the management and operation of Cumberland along with her husband Ray Huckaby.

The charges against Huckaby originate with ten 703 forms which Cumberland submitted to Arkansas Social Services in August, 1979. The purpose of the 703 form is to describe a patient's physical and mental condition. Patient condition determines level of care classification. The two-page form is divided into sections labeled "Diagnosis," "Status of Major Impairment," "Degree of Incapacity," "Plan of Care," "Nursing Home Services Required," "Nurses Comments," "Assessment of Social Needs," and "Prognosis." Three sections, "Degree of Incapacity," "Nursing Services Required," and "Status of Major Impairment," are completed by checking appropriate blanks. The remaining sections have blanks for making comments.

Elizabeth Johnson, Director of Nursing at Cumberland, filled out the forms in August, 1979. Johnson began working for Cumberland in November, 1978. At trial, she testified she and Huckaby had a number of disagreements about the correct way to fill out 703s starting in February, 1979. Johnson said Huckaby told her she was not showing enough intermediate and skilled care patients on the forms. On this occasion, Huckaby told Johnson to redo the forms four times. Johnson testified she filled out the forms the same way every time because, in her opinion, the forms properly reflected each patient's condition. The fourth and last time Johnson redid the forms she put them in an administrative office and left for the day. She took the following day off, but called the nursing home midway through the afternoon to check in. When she called, she discovered Huckaby had three employees redoing the 703s. Johnson went to the Social Services office the following Monday to examine the

forms and found ten had been changed to reflect a greater degree of patient incapacity. Huckaby fired Johnson when she returned to Cumberland to tender her resignation.

The redone forms were delivered to Arkansas Social Services. Dr. Ray A. Brinkley, a private physician working with Arkansas Social Services, reclassified all the Medicaid recipients named in the forms from class "C" (minimum care) to class "B" (intermediate care) based on the information in the forms. As a result of this reclassification, Cumberland received an additional $2,788.76 over the next six months.

At the conclusion of the government's case, Huckaby moved for judgment of acquittal on all counts. The motion was denied in part and the court [2] reserved ruling on the sufficiency of Counts VI and X. The court also denied a defense motion for a mistrial stemming from allegedly prejudicial testimony for a government rebuttal witness. The jury returned a guilty verdict on all ten counts. The court set aside the verdict as to Counts VI and X. The court sentenced Huckaby to a suspended one-year and one-day term of imprisonment on each count, the terms to run concurrently, and placed her on probation for a total of four years. In addition, the court fined Huckaby $8,000 ($1,000 for each count) and directed her to make restitution in the sum of $2,511.96. [3]

Huckaby appeals her conviction. She challenges the sufficiency of the evidence used to convict her and the sufficiency of the indictment under which she was charged. She also argues the Medicaid fraud provision is unconstitu-

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[2]The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

[3]The court deducted $276.80 from the total amount of money Cumberland received as a result of the upward reclassification because the jury verdicts were set aside for Counts VI and X.

tionally vague. Finally, she maintains the district court erred in not declaring a mistrial when the government elicited testimony concerning other crimes contrary to Fed. R. Evid. 404 (b).

A. Sufficiency of the Evidence

Huckaby argues the evidence was insufficient to establish that she violated 42 U.S.C. §1396h (a) (3) because the government did not prove: (1) the actual level of care Cumberland provided to the named Medicaid patients, and (2) that she knowingly concealed or failed to disclose this level of care with intent to defraud the government.

Huckaby's first argument assumes the government needed direct evidence of the actual care Cumberland patients received in order to prove the charges in the indictment. Because Cumberland could have provided more nursing care than patient condition necessitated, Huckaby maintains proof of actual care is crucial to the case.

For the most part, government witness testimony followed a set format. The witnesses compared the information on each patient contained in the 703s to their own knowledge about the patient's condition.[4] For example, all of the 703 forms represent that the named patient needs total help with grooming, including bathing, care of hair and dressing. Government witnesses testified these patients needed little or no help with these tasks. Similarly, all but one of the forms described the named patients as bedfast. The witnesses disagreed, characterizing these same patients as up and about and taking care of

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[4]Most of the government witnesses were employee at Cumberland and testified from personal knowledge. The government also called Dr. Roy Brinkley. Dr. Brinkley, a physician with Arkansas Social Services, reviewed the nurse's notes kept on each patient and gave his opinion about each patient's condition based on his expert review of these daily logs.

themselves. In Huckaby's view, this type of testimony does not prove the charges against her.

We disagree. The jury could reasonably infer Huckaby concealed or failed to disclose the actual level of care these Medicaid patients received from government witness testimony that she misrepresented these patients' needs on the 703 forms. In reviewing challenges to the sufficiency of the evidence, this Court views the evidence in the light most favorable to the verdict rendered and accepts all reasonable inferences from the evidence which support the verdict. *United States v. Yancy*, 688 F.2d 70, 71 (8th Cir. 1982); *United States v. Taylor*, 599 F.2d 832, 837 (8th Cir. 1979). We will not disturb the jury's logical conclusion that misrepresentation of one set of facts—patient condition—was intended to conceal another set of facts—actual level of care.

Moreover, the government introduced nursing notes kept on each named patient each day for the month before Cumberland submitted the 703s to Social Services. These nusing notes are regularly kept records of the care the nursing staff gives to all patients on the nursing shift. They provide direct evidence of the actual care the named patients received. There is a clear discrepancy between the care recorded in the nurse's notes and patient condition as represented in the 703s. [5]

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[5]This discrepancy is clear when the "Degree of Incapacity" section of the 703 form is compared with the daily nurse's notes kept at this same time period. All of the 703s have "Total Help" marked under grooming. The nurse's notes show six of these patients generally took care of their own grooming needs. Similarly, the blanks next to "bedfast" and "sits in chair part time" are marked on the 703s for seven of the eight named patients. In contrast, the nurse's notes report these patients walked whenever they wanted, without assistance. Finally, all of the patients were designated "markedly confused" and "hyperactive" on the 703s. The nurse's notes show only one patient who fits that description.

A careful review of the nurse's notes, witness testimony, and the 703 forms support the jury's conclusion that the 703 forms were used to conceal the actual level of care provided to the named Medicaid patients.

Huckaby also challenges the sufficiency of the evidence demonstrating her intent to defraud the government. In this case, as in many others, circumstantial evidence is the only available means of proving intent. The circumstances surrounding the changed forms evince Huckaby's intent to defraud.

From the start of her disagreements with Johnson over the correct way to fill out the 703 forms, Huckaby said she wanted more intermediate and skilled care patients. She put a red line through "incorrect" forms and marked where the checks should go. When Johnson adamantly refused to change the forms, Huckaby turned them over to other employees to be redone. These employees testified they knew Huckaby's aim was to upgrade patient classification. Huckaby told one employee that Arkansas Social Services put a grid over the check marks and classified patients based on the location of the marks in the grid. This employee was told to put as many checks as possible in the "total help" section. Huckaby told other employees to leave the "degree of incapacity" section blank so that she and another administrator could fill out this crucial section. Employees filling in the "nurse's comments" section were instructed to begin each comment with the phrase "this patient needs total care due to * * * " and finish with an ailment from the patient's chart. In addition, when Huckaby fired Johnson for objecting to the changed form, she told Johnson it was because "she was no longer loyal to their cause."

Other nursing home owners and operators testified at trial that Huckaby should have been aware of the condition of Cumberland's residents. Yet, she directed her employees to exaggerate these patients's incapacities on the 703 forms.

The government introduced evidence of financial difficulties at Cumberland to supply a motive for fraud. Indeed, misrepresenting these patients' conditions did financially benefit Cumberland. The jury had two options. They could believe that Huckaby directed the forms be changed because she thought these patients were much worse off than either the nurse's notes or employee testimony reflect. Alternatively, the jury could have reasonably concluded that Huckaby ordered the 703s changed so these patients would be falsely reclassified, and Cumberland would receive a greater reimbursement. The evidence is sufficient to sustain the latter conclusion.

After viewing the evidence in the light most favorable to the government, we conclude the jury could have found beyond a reasonagle doubt that Huckaby concealed the actual level of care given to the named patients with intent to defraud the government. *See, In re Winship*, 397 U.S. 358, 362 (1970); *United States v. Baker*, 650 F.2d 936, 938 (8th Cir. 1981). Thus, the evidence is sufficient to prove each element of the indictment.

B. The Indictment.

Huckaby argues the indictment does not charge an offense prohibited by the fraud provision of the Medicaid Act.[6] 42 U.S.C. §1396h (a) (3). The provision prohibits concealing or failing to disclose a known event affecting the continued right to payment with an intent fraudulently to secure a payment in excess of what is due. *Id.* The indictment charged Huckaby as follows:

> that on or about August 9, 1979, in the Eastern District of Arkansas, Mabel Huckaby, with intent to defraud the United States of America and the State

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[6]Huckaby challenged the indictment in a pretrial motion although not on this ground. Nonetheless, to a limited extent, challenges to the sufficiency of an indictment are cognizable for the first time on appeal. *See United States v. Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982).

> of Arkansas, did conceal and fail to disclose *the actual level of care* provided by Cumberland Lodge Nursing Home to Medicaid recipient (patient's name) for the purpose of securing Medicaid payments in greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code. [Emphasis added.]

Huckaby claims "actual level of care" is not an "event affecting" the continued right to benefits because an event is necessarily an occurrence of limited duration such as the death or transfer of a patient. In addition, she asserts the indictment does not allege that she knew the actual level of care Cumberland patients received.

We cannot agree Congress intended section 1396h (a) (3) to control only the artificially narrow category of cases Huckaby proposes. According to the legislative history, Congress intended to prohibit a broad range of Medicaid program abuse. *See* 1972 U.S. Code & Ad. News 4989, 5093. Concealing the level of care given to Medicaid recipients in order to defraud the government out of additional Medicaid funds is undoubtedly within the purview of the statutory prohibition.

We likewise find the indictment adequately charged Huckaby with knowledge of the concealed event. Charging her with failing to disclose the event implies Huckaby knew the subject of her cover-up. Moreover, the indictment alleges the essential element of intent to defraud. This allegation also implies Huckaby knew what she was concealing.

An indictment is sufficient if it may be reasonably construed to charge the offense for which the defendant is convicted. *United States v. Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982). The indictment filed against Huckaby clearly meets this standard.

Huckaby also argues the indictment is unconstitutionally vague because it necessarily incorporates a standard for determining level of care which is "vague, ambiguous, uncertain, and indefinite." Huckaby refers here to the standards used by Dr. Roy Brinkley to classify nursing home patients based on information in the 703 forms.

The fallacy of this argument, as the government points out, is that these standards were incorporated into the indictment. Huckaby is not charged with misapplying these standards. She is charged with putting false information on a form with intent to defraud the government in violation of a federal statute. The ambiguity in the standards may foster inconsistent judgments inside the Arkansas Social Services agency, but this ambiguity has nothing to do with Huckaby's conviction. The indictment is not unconstitutionally vague.

C. The Statute.

Huckaby attacks the constitutionality of 42 U.S.C. §1396h (a) (3) for the first time on appeal. she argues the vagueness of the statutory language offends due process.

Generally, constitutional challenges not raised before the trial court are not cognizable on appeal unless they constitute plain error. *United States v. Chrisco*, 487 F.2d 505, 506 (8th Cir. 1973), *cert. denied*, 419 U.S. 847 (1974); *Tollett v. United States*, 444 F.2d 622, 625 (8th Cir. 1971). *Cf. Becton v. United States*, 412 F.2d 1005, 1007 (8th Cir. 1969). Nonetheless, we have considered Huckaby's vagueness challenge, and found it spurious. Criminal statutes are constitutional if they give fair warning of the proscribed conduct. *United States v. Harriss*, 347 U.S. 612, 617 (1954); *United States v. Cartano*, 534 F.2d 788, 793 (8th Cir.), *cert. denied*, 429 U.S. 843 (1976). Huckaby claims the statutory phrase "occurrence of any event affecting" is overly broad

and uncertain, raising legitimate questions about which occurrences affecting Medicaid payments must be disclosed. Even if this argument has merit, the requisite element of intent to defraud cures any ambiguity in the statutory description of the proscribed conduct. A nondisclosure of any event motivated by intent to defraud is prohibited. Read as a whole, the statute gives fair warning of the proscribed conduct and is clearly constitutional.

D. The Motion for a Mistrial.

At trial, the defense presented evidence that Huckaby had no motive for exaggerating patient incapacity on the 703s because state regulations required her to hire more personnel as the number of intermediate and skilled care patients at the home increased. Thus, the argument goes, any extra funds gained by falsifying the 703s would be absorbed by the cost of increasing the staff. To rebut this defense, the government offered the testimony of Walter Hathaway, a Cumberland employee from October, 1979, to January, 1980. Hathaway testified he observed Huckaby punch in blank or dummy employee time cards while he was working at Cumberland. The appellant's counsel objected that the testimony violated Fed. R. Evid. 404(b) [7] and moved for a mistrial. The judge instructed the jury to regard the testimony as limited to the issue whether the nursing home was understaffed and should be considered for no other purpose. The judge also told the jury to disregard the testimony as it pertained to Mabel Huckaby. On appeal, Huckaby argues the judge erred in not granting her motion for a mistrial.

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[7] Federal Rules of Evidence 404(b) provides:

> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The requirements for admission of evidence of other crimes, wrongs or acts are well established. The requirements are

> (1) a material issue on which other crimes evidence may be admissible has been raised; (2) the proffered evidence is relevant to that issue; (3) the evidence of other crimes is clear and convincing. In addition, to be admissible on such issues as intent, knowledge, or plan, the other crimes evidence must relate to wrongdoing "similar in kind and reasonably close in time to the charge at trial." Finally, the evidence otherwise admissible under Rule 404(b) may be excluded under Fed. R. Evid. 403, "if its probative value is substantially outweighed by the danger of unfair prejudice."

United States v. Auerbach, 682 F.2d 735, 739 n.5 (8th Cir. 1982), *quoting United States v. Robbins*, 613 F.2d 688, 693-694 (8th Cir. 1979).

The evidence admitted in this case clearly meets these requirements. The defense raised the staffing issue. The government merely sought to rebut the argument that reclassification did not produce monetary benefits by showing Cumberland employees falsified time cards to give the appearance of a larger staff. An eyewitness report of time card falsification is relevant to this issue and meets the standard of clear and convincing proof. Moreover, any danger of unfair prejudice was adequately cured by the judge's instruction to the jury. The other crimes evidence was thus admissible, and the district court did not err in denying Huckaby's motion for a mistrial.

After carefully reviewing the record, including the trial transcript and all exhibits, we affirm the judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1650	)	September Term 1982
	)	
	)	
United States of America,	)	
	)	
Appellee,	)	
	)	Appeal from the United States
vs.	)	District Court for the
	)	Eastern District of Arkansas
Mabel Huckaby,	)	
	)	
Appellant.	)	

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

January 6, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

United States of America	)	
	)	No. Lr-Cr-81-96
v.	)	
	)	42 U.S.C. §1396h (a) (3)
Mabel Huckaby	)	
	)	(NMT $25,000; NMT 5 Yrs.;
	)	or both)

INDICTMENT

COUNT I

THE GRAND JURY CHARGES:

That at all times material to this indictment:

1. On July 30, 1965, Public Law 89-97, Title XIX of the Social Security Act (hereinafter referred to as the Medicaid Act) was enacted by the United States Congress and was signed into law by the President of the United States thereby creating the Medicaid Program.

2. Pursuant to the Medicaid Act, the United States Department of Health, Education and Welfare, currently referred to as the United States Department of Health and Human Services, shares with each state the cost of providing necessary medical goods and services to families with dependent children and to the aged, blind or disabled individuals whose income is insufficient to meet the cost of such necessary medical goods and services.

3. Pursuant to the Medicaid Act, each State may receive federal financial participation for a Medicaid Program upon the enactment of a State Medicaid enabling law for statewide medical assistance.

4. On November 6, 1965, Act 14 of 1965 (2nd Extraordinary Session) was enacted by the General Assembly of Arkansas and was signed into law by the Governor of Arkansas, creating the Arkansas Medicaid Program to be administered by the Arkansas Department of Human Services, Division of Social Services.

5. On January 1, 1970, the Arkansas Division of Social Services published a statewide medical plan which was approved by the United States Department of Health, Education and Welfare in accordance with the provisions of the Medicaid Act.

6. On Janauary 12, 1978, the United States Department of Health, Education and Welfare approved revisions in the Arkansas Medicaid Plan which pertained to the reimbursement program for Long Term Care Facilities.

7. During the 1979 calendar year providers of Long Term Care services to Medicaid recipients were to be reimbursed under the Arkansas Medicaid Plan for the reasonable cost of such services.

8. Under the Arkansas Medicaid Plan providers of Long Term Care services to Medicaid recipients were to be reimbursed according to the level of care required by the particular Medicaid recipient. For the purpose of administering that portion of the Arkansas Medicaid Plan which pertains to the reimbursement program for Long Term Care Facilities, the Division of Social Services, Arkansas Department of Human Services, has classified Medicaid recipients in nursing homes in three categories according to the level of care required by the Medicaid recipient: (1) skilled care patients; (2) intermediate care patients; and (3) minimum care patients. Skilled care patients are designated as "A" patients for the purpose of determining the amount of money to be reimbursed to a nursing home under the Arkansas Medicaid Program. Intermediate care nursing home Medicaid recipients are designated as "B" patients for the purpose of determining the amount of money to be reimbursed to a nursing home under the Arkansas Medicaid Program. Minimum care nursing home Medicaid recipients are designated as "C" patients for the purpose of determining the amount of money to be reimbursed to a nursing home under the Arkansas Medicaid Program. The amount of money which a nursing home receives under the Arkansas Medicaid Program depends on the patient classification of the particular nursing home Medicaid recipient. Nursing homes receive higher payments under the Arkansas Medicaid Program for Medicaid recipients which require skilled care than for Medicaid recipients which require either intermediate care of minimum care.

9. Under the Arkansas Medicaid Program, payments are made directly to the provider of facilities which render Long Term Care to eligible individuals.

10. The Office of Long Term Care, Division of Social Services, Arkansas Department of Human Services, receives information relating to the classification of Medicaid recipients in nursing homes, processes and pay claims submitted by providers of Long Term Care services rendered to Medicaid recipients.

11. MABEL HUCKABY owned an interest in and participated in the management and operation of the Cumberland Lodge Nursing Home in Little Rock, Arkansas. Cumberland Lodge was an intermediate care facility and was an authorized provider of Long Term Care Services under the Title XIX Medicaid Long Term Care Program. Cumberland Lodge Nursing Home had been assigned provider number 186.

12. Ray Huckaby, the husband of MABEL HUCKABY, also owned an interest in and participated in the management and operation of Cumberland Lodge Nursing Home. That Ray Huckaby personally contracted in writing with the Arkansas Department of Human Services, Division of Social Services, to be a Long Term Care facilities provider and made written claims for payment to the Office of Long Term Care for services rendered pursuant to said agreement.

13. Money reimbursed to Cumberland Lodge for providing Long Term Care services to Medicaid recipients was derived from both federal and State tax dollars.

14. That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of care provided by Cumberland Lodge Nursing Home to

Medicaid recipient Grayce Murray for the purpose of securing Medicaid payments in a greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

COUNT II

The grand jury realleges paragraphs one through thirteen of Count I of the indictment.

That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of care provided by Cumberland Lodge Nursing Home to Medicaid recipient, Thomas Cassidy, for the purpose of securing Medicaid payments in a greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

COUNT III

The grand jury realleges paragraphs one through thirteen of Count 1 of the indictment.

That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of care provided by Cumberland Lodge Nursing Home to Medicaid recipient, Glen Morton, for the purpose of securing Medicaid payments in greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

COUNT IV

The grand jury realleges paragraphs one through thirteen of Count 1 of the indictment.

That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of care provided by Cumberland Lodge Nursing Home to Medicaid recipient, Mary Welch, for the purpose of securing Medicaid payments in a greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

COUNT V

The grand jury realleges paragraphs one through thirteen of Count I of the indictment.

That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of care provided by Cumberland Lodge Nursing Home to Medicaid recipient, Catherine Yaniger, for the purpose of securing Medicaid payments in a greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

COUNT VI

The grand jury realleges paragraphs one through thirteen of Count I of the indictment.

That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of care provided by Cumberland Lodge Nursing Home to Medicaid recipient, Johnny Gidron, for the purpose of securing Medicaid payments in a greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

COUNT VII

The grand jury realleges paragraphs one through thirteen of Count I of the indictment.

That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of care provided by Cumberland Lodge Nursing Home to Medicaid recipient, Lola Turney, for the purpose of securing Medicaid payments in a greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

COUNT VIII

The grand jury realleges paragraphs one through thirteen of Count I of the indictment.

That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of care provided by Cumerland Lodge Nursing Home to Medicaid recipient, William Moore, for the purpose of securing Medicaid payments in a greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

COUNT IX

The grand jury realleges paragraphs one through thirteen of Count I of the indictment.

That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of

care provided by Cumberland Lodge Nursing Home to Medicaid recipient, Myrtle Knight, for the purpose of securing Medicaid payments in a greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

COUNT X

The grand jury realleges paragraphs one through thirteen of Count I of the indictment.

That on or about August 9, 1979, in the Eastern District of Arkansas, MABEL HUCKABY, with intent to defraud the United States of America and the State of Arkansas, did conceal and fail to disclose the actual level of care provided by Cumberland Lodge Nursing Home to Medicaid recipient, Sreathie Huett, for the purpose of securing Medicaid payments in a greater amount than was due, a violation of Section 1396h (a) (3) of Title 42 of the United States Code.

A TRUE BILL.

/s/ Larry Rutherford
FOREMAN

/s/ George W. Proctor
GEORGE W. PROCTOR
United States Attorney
Eastern District of Arkansas

/s/ Robert J. Govar
ROBERT J. GOVAR
Assistant United States Attorney
Eastern District of Arkansas

APPENDIX D

SKILLED—Patients being completely helpless, needing such services as those provided by or requiring the supervision of skilled nursing personnel or skilled rehabilitation services. These patients would not be able to ambulate at all under their own power, they would be totally incontinent using catheters or colostomy drainage; mental status would be completely withdrawn, completely confused or hyperactive. They would be fed by an attendant, by tube or intravenously; medications would be complex. Under this classification would be the irrigation of wounds, changing dressings, administration of oxygen, intermittent positive pressure breathing therapy, frequent suctioning, physical therapy, prosthesis removal and various other therapies.

INTERMEDIATE—Patients able to walk with the help of an attendant or use of a wheel chair with some help. They would be in bed some part of the day and would ordinarily need some help in moving from bed to chair. They would be partially incontinent of bowels and bladder, but not have regular use of catheter or colostomy. The mental status would vary from clear to markedly confused requiring supervisor for personal safety. They would need some help in eating. Dietary considerations would be more complex than a regular diet, diabetic or soft. The medications would involve more injectable medications being needed and some of the more complicated medications would require more skilled observation.

MINIMUM—They would walk with a cane, crutches, walker or be able to use a wheelchair without help. They would be able to feed themselves, going to the dining room without a great deal of cleaning up afterwards. They would be continent of bowels and bladder. Assistance with grooming will vary from no help to total help. Mental status will vary from clear to markedly confused requiring supervisor for personal safety. Dietary modifications should

be very minor such as soft or diabetic diet. Medications should be a minimal amount and should be able to administer them with a minimum of difficulty or skilled personnel.

*NOTE: The above criteria is used by the reviewing physician as a general framework only for the exercise of professional judgment. It is not used in a check list fashion or as rigid criteria for approving or denying nursing home care or in the classification of those patients already approved and residing in Long Term Care Facilities.

10-14 Change of Condition.

Arkansas Social Services
P. O. Box 1437, Little Rock, Arkansas
Zip Code 72203
Attention: Nursing Home Section

ARKANSAS SOCIAL SERVICES
EVALUATION OF NEED FOR NURSING HOME CARE

SS-703

☐ Application
☑ Re-classification

AUG 21 1979

PART I

Patient's Name (Last)	(First)	(Middle)
Turner	Lola	
Birthdate (Mo., Yr.)	Sex	Medicaid I.D.No.
3-22-1907	M F	
County	Category	Case No.
Pr. Creek	AA AB AD	
Casehead's Name		

Name of Nursing Home: Cumberland Lodge — Provider No.: 186

Date Entered: 3/28/79

Has applicant/recipient been a patient in a nursing home before? ☐ Yes ☐ No

If yes, Name of Home _____

Address _____

For the purpose of determining my need for licensed nursing home care, I hereby authorize the release of any medical information by a licensed physician to Arkansas Social Services. (If signed by MARK, must have signatures of two witnesses.)

Witnesses: Vicky J Hawks
Michael Hucketh

Signature: X Lee Mark
(Patient's or Legal Guardian's)

PART II

DIAGNOSIS (In the order of significance as related to need for nursing care):

A. Old Cerebral thrombosis

B. Cellulitis, hypertension, Cardiovascular disease

STATUS OF MAJOR IMPAIRMENT

_____ Improving _____ Stable ✓ Progressive

DEGREE OF INCAPACITY (Care required or conditions requiring attention)

Bedridden	Ambulation	Grooming
✓ Bedfast	__ Walks alone	Tub bath __ No help __ Partial help ✓ Total help
__ Sits on side of bed	✓ Walks with cane/crutch/walker	Bed bath __ No help __ Partial help ✓ Total help
✓ Sits up in chair part-time	✓ Walks with help of attendant(s)	Shower bath __ No help __ Partial help ✓ Total help
__ Bed to chair without help	__ Uses wheelchair with/without help	Dressing __ No help __ Partial help ✓ Total help
__ Must be lifted into chair		Shaving __ No help __ Partial help __ Total help
__ Requires turning in bed		Care of hair __ No help __ Partial help ✓ Total help

Continence Status

Incontinent _____ Yes _____ No ✓ Partially _____ Totally

Artificial Aids: Catheter _____ Colostomy _____

Mental Status

__ Clear	✓ Markedly confused	__ Withdrawn
__ Somewhat confused	✓ Needs supervisor for personal safety	__ Needs restraint
__ Moderately confused	✓ Hyperactive	

B

AUG 20 1979

W3A

APPENDIX E

10-1[redacted] Lange of Christian

Arkansas Social Services
P. O. Box 1437, Little Rock, Arkansas
Zip Code 72203
Attention: Nursing Home Section

ARKANSAS SOCIAL SERVICES
EVALUATION OF NEED FOR NURSING HOME CARE
SS-703

☐ Application
☑ Revised Notice

PART I

Patient's Name (Last) (First) (Middle)	Name of Nursing Home / Provider No.
[redacted]	Christian Living Ctr. 186
Birthdate (Mo. Yr.) / Sex / Medicaid I.D. No.	Date Entered
3-22-14 M [redacted]	1/27/74
County / Category / Case No.	Has applicant/recipient been a patient in a nursing home before? ☐ Yes ☐ No
[redacted] AA AB AD	If yes, Name of Home
Caseworker's Name	Address

For the purpose of determining my need for licensed nursing home care, I hereby authorize the release of any medical information by a licensed physician to Arkansas Social Services. (If signed by MARK, must have signature of two witnesses.)

Witness Lucia Thornhill Signature [redacted] (Patient's or Legal Guardian's)

Doris Black R.

PART II

DIAGNOSIS (In the order of significance as related to need for nursing care)

A. [illegible]

B. [illegible]

STATUS OF MAJOR IMPAIRMENT

Improving ___ Stable ___ Progressive

DEGREE OF INCAPACITY (Care required or conditions requiring attention)

Bedridden	Ambulation	Grooming			
Bedfast	Walks alone	Tub bath	No help	Partial help	Total help
Sits on side of bed	Walks with cane/crutch/walker	Bed bath	No help	Partial help	Total help
Sits up in chair part-time	Walks with help of attendant(s)	Shower bath	No help	Partial help	Total help
Bed to chair without help	Uses wheelchair with/without help	Dressing	No help	Partial help	Total help
Must be lifted into chair		Shaving	No help	Partial help	Total help
Requires turning in bed		Care of hair	No help	Partial help	Total help

Continence Status

Incontinent ___ Yes ___ No ___ Partially ___ Totally

Artificial Aids: Catheter ___ Colostomy ___

Status

Oriented ___ Markedly confused ___ Withdrawn

Somewhat confused ___ Needs supervision for personal safety ___ Needs restraint

Moderately confused ___ Hyperactive

B

AUG 2 1974

10-7-75 SS-703

Applicant/Recipient's Name

Eating

Feeds self ✓ Some help needed Fed by attendant Feeding other than by mouth

Admission or continued care in nursing home required due to:

Irreversible loss of hearing and bilateral loss of vision with chronic schizophrenic reaction, hypertension, & chronic cerebrovascular disease.

PLAN OF CARE (Include Diet, Medications, treatments, restorative and rehabilitative services, activities):

Low Sodium Diet
Vitamins - Dyazide - Cal. Gluconate
Milk of Mag. Prn
Dramamine 25mg Prn
Valium 5mg Prn
Keflex 250mg q.i.d.
Tylenol #3 Prn
Tuinal - Prn
Librium 25mg Prn
Isuprel 5mg Inhal. Prn
Ventolin Inhal. Prn
Darvon-N 100 Prn
Chloral Hydrate 1 gm Prn
Ativan 2mg Prn
Ampicillin 250mg q.i.d.
Ascorbic Acid 100mg q.i.d.
Ferrous Sulfate 300mg t.i.d.
Colace 100mg b.i.d.
Mineral Oil 30cc Prn

NURSING HOME SERVICES REQUIRED

- ✓ Administration and/or supervision of medications
- ✓ Personal care (bathing, oral hygiene, skin, nail care)
- Nutrition (including special diets)
- ✓ Fluid balance plus electrolytes
- ✓ Elimination
- ✓ Rest and sleep
- ✓ Physical activity
- Ingestants (including enemas)
- Dressings and bandages
- Normal exercise program
- ✓ Rehabilitation (other than formal exercise)
- ✓ Prevention of complications and infections
- ✓ Recreation diversion
- Clinical procedures (urostomy, B.P., etc.)
- ✓ Special treatments
- ✓ Requires services of Licensed Personnel
- Procedures and techniques taught to patient

NURSES COMMENTS Medically necessary regular diet, Dyazide & Cal. Gluconate for hypertension, Librium for chronic schizophrenic reaction, Isuprel & Ventolin for chronic cerebrovascular disease, Keflex for chronic pyelonephritis, Ativan & Valium for anxiety, Darvon-N & Tylenol #3 for pain, Colace & Mineral Oil for constipation.

ASSESSMENT OF SOCIAL NEEDS

Long term Nursing Home Care

Flubing Family Worker

These needs can be met by nursing home ✓ YES NO

Nursing Home has written agreement with outside agency to provide social needs YES NO

PROGNOSIS Fair

Estimate duration of need for nursing home care 30 days 60 days 90 days 6 months ✓ Indefinite

Is the patient's need for nursing home care the result of an accident caused by a third party? (If checked yes, please include with this form any identifying information you have about the accident, plus the name of any insurance company involved.) YES NO

I have examined the patient within the past 7 days and have reviewed the form and certify to the accuracy of the information. I am aware of the Utilization Review requirements for the necessity of admission and for continued stay and that this form will be reviewed by the Utilization Review Committee of the Nursing Home Unit of Arkansas Social Services.

Signature of Examining Physician 7/31/75 Date

Date of last Utilization Review

Classification of Patient C

(This information is to be taken from patient's most recent SS-704.)

10-1-75

SS-703

Applicant/Recipient's Name Lola Turney

Eating

___ Feeds self ___/___ Some help needed ___ Fed by attendant ___ Feeding other than by mouth

Admission or continued care in nursing home required due to:

Pt is unable to care for herself due to the Dx of phlebothrombosis, cellulitis, hypertension cardiovascular disease

PLAN OF CARE (Include Diet, Medications, treatments, restorative and rehabilitative services, activities):

Diet - Low Sodium - 2 Gm
Rt Meds - Slow K ½ tab BID PO
Meniprex 1mg ½ cap PO BID
Coumadin 2.5mg ½ PO daily
Tylenol #1 tab @ HS
Esidrix ½ daily (HCTZ)
Nitrobid Paste 1" q6°
PRN - Dalmane 15mg @ HS PRN sleep
Dobutetals #1 HS PRN sedative
Tylenol #3 PRN q 3-4° PRN pain

Treatments - warm support hose daily
Aquaphor Oint. q day PRN
Hydrocortisone Oint 1% BID to
Denkle area PRN
Flutex enema PRN

Drs Rt Rodus - Trigon Dsupp. 200mg PR nausea
Lomotil 2.5mg tab ½ q 8 PRN diarrhea
Tylenol 650mg PO q 4° PRN pain
Valium 5-10mg PO-IM q am anti agitation
Atarax ½ mg BID PRN agitation
Benedryl 50mg PO-IM q HS PRN sleep
Lactulax supp ½ PR PRN constipation

NURSING HOME SERVICES REQUIRED:

- ✓ Administration and/or supervision of medications
- ✓ Personal care (bathing, oral hygiene, skin, nail care)
- ✓ Nutrition (including special diets)
- ✓ Fluid balance plus electrolytes
- ✓ Elimination
- ✓ Rest and sleep
- ✓ Physical activity
- ✓ Irrigations (including enemas)
- ___ Dressings and bandages
- ✓ Normal exercise program
- ✓ Rehabilitation (other than formal exercise)
- ✓ Prevention of complications and infections
- ✓ Recreation diversion
- ✓ Clinical procedures (urinalysis, B/P, etc.)
- ✓ Special treatments
- ✓ Requires services of Licensed Personnel
- ___ Procedures and techniques taught to patient

NURSES COMMENTS: Medically - becoming weaker & more confused & has angina - Nitrobid paste 1" q6° Slow K absorption by phlebothrombosis - unstable gait & has fallen frequently - requires assistance & dc Dx of cellulitis - & demanding

ASSESSMENT OF SOCIAL NEEDS: Freq. visits from family
Feeling of self-worth -

These needs can be met by nursing home. ✓ YES ___ NO

Nursing Home has written agreement with outside agency to provide social needs. ___ YES ___ NO

PROGNOSIS: Fair

Estimate duration of need for nursing home care: ___ 30 days ___ 60 days ___ 90 days ___ 6 months ✓ Indefinite

Is this patient's need for nursing home care the result of an accident caused by a third party? (If checked yes, please include with this form any identifying information you may have about the accident, plus the name of any insurance company involved.) ___ YES ___ NO

I have examined this patient within the past 7 days and have reviewed this form and certify to the accuracy of the information. I am aware of the Utilization Review requirements for the necessity of admission and for continued stay and that this form will be reviewed by the Utilization Review Committee of the Nursing Home Unit of Arkansas Social Services.

Signature of Examining Physician — Date 7/31/75

Date of last Utilization Review ___

Classification of Patient C

(This information is to be taken from patient's most recent SS-704)

U3B

APPENDIX F

ROY A. BRINKLEY

called as a witness, by and on behalf of the Plaintiff, having been sworn, testified as follows, to-wit:

DIRECT EXAMINATION
BY MR. GOVAR:

Q. Sir, would you please state your name?

A. Roy A. Brinkley.

Q. Where do you currently reside, Mr. Brinkley?

A. I live in North Little Rock, Arkansas.

Q. Alright, where is your business address?

A. I practice medicine at 220 Doctor's Park, Little Rock.

Q. And I think you have answered this qustion, but what is your occupation or profession?

A. I am a physician.

Q. Alright, are you specialized in any particular area of medicine?

A. I specialize in internal medicine.

Q. Alright, where did you attend undergraduate school?

A. At Mississippi State College in Starkville, Mississippi.

Q. When did you graduate?

A. From undergraduate?

Q. Yes.

A. 1946—1949.

MR. LESSENBERRY: We would be pleased to stipulate to the credentials of Dr. Brinkley.

THE COURT: Alright, Mr. Govar?

MR. GOVAR: That will save us some time.

THE COURT: Alright.

BY MR. GOVAR:

Q. Now but I do have to ask this question, Dr. Brinkley how long have you been a doctor?

A. Since 1957.

Q. Can you tell me how many years about?

A. That is twenty-four years.

Q. Twenty-four, alright. Have you ever been employed by the State of Arkansas?

A. Yes sir.

Q. Alright, do you recall when your employment with the State of Arkansas began?

A. It was about 1966 or 1967.

Q. Can you tell the ladies and gentlemen of the jury how, your employment with the State was initiated?

A. I received a call from the welfare commissioner, who at that time was Mr. Blaylock and he asked me if I would do a consulting job for them in the nursing home division of the State Welfare Department. He explained to me that this job would consist of looking at case reports of nursing home patients and determining for the State Welfare Department how much or what level of care they needed. Because that was the way that Social Services or it was still State Welfare Department at that time, this is how they paid on the basis of what the need was and that we had some criteria by which we determined this and this was what he specifically asked me to do and I took the job.

Q. Alright, now let's get this straight, what agency of the State of Arkansas did you take a job?

A. It was the State Welfare Department.

Q. Okay, and that was in 1966?

A. It was in the 66-67 time frame, I don't remember—

Q. Okay—

A. The exact time.

Q. Do you recall what your specific position or job title was?

A. No, I don't know what my job title was or my position title. I know what I was supposed to do.

Q. What was your primary duty in that position?

A. My primary duty was to classify patients—the welfare patients who were in nursing homes, for the Department for the purpose of determining the level of care that they required, while in the nursing home.

Q. What was the significance of that classification process to the nursing home?

A. Well, it was important to the nursing home because we pay—we being State Welfare Department paid on the basis of a need for service, or the level of care that they needed. And the homes received pay according to the classification they received.

Q. Okay, did you recall how long you occupied this particular job with the State Welfare Department or Social Services, as it later became?

A. I did that job until June of 1982, 1981.

Q. 1981? What happened in June of 1981?

A. The particular section that I was with was terminated.

Q. You were a budget cut?

A. I was a budget cut.

Q. Now, are you familiar with the criteria or the standards that were used by the State of Arkansas in classifying medicaid patients in nursing homes?

A. Yes sir.

Q. Alright, do you know who formulated those standards?

A. Yes sir.

Q. Who?

A. Me.

Q. Did anyone assist you in that effort?

A. Well, I had some assistance from the members of the Department of Long Term Care, the nursing home section, at that time. We sat down and reworked the existing criteria that we had at the time I took the position. We reworked that and as far as I know it is the same criteria that is being used at the present time unless it is a very recent change.

Q. Okay, but you haven't worked with the State since June of 1981, is that right?

A. I work with the State now, but it is in a different capacity.

Q. Alright. Now, do you know a man by the name of Charles Stewart?

A. Yes sir.

Q. Did he assist you in formulating the standards for medicaid patients in nursing homes?

A. No sir.

Q. Are you sure about that?

A. Yes sir.

Q. Do you know who he is?

A. Yes sir.

Q. Who is he?

A. At the time that I knew him, he was the executive secretary of the Arkansas Nursing Home Association.

Q. Okay, can you tell the ladies and gentlemen of the jury were these standards governing the classification of medicaid patients, were these were derived from or what information they were based on?

A. Well, they were based on—primarily on regulations governing the payments and standards for nursing homes care that was formulated ultimately from the federal department that oversaw our operations in the State. I don't know which federal agency put those guidelines out but we derived our classification criteria from some guidelines that were put forth by the federal regulations.

Q. Okay. So the standards were based partially upon existing federal regulations and criteria, is that it?

A. And our own thoughts about how we could best apply them to our own situation.

Q. Your Honor, I would like to have marked as Government's Exhibit 13, Your Honor.

BY MR. GOVAR:

Q. I am going to hand you what has been previously marked as, this is just a copy of the same thing, has been previously marked as Defense Exhibit 11. Do you recognize that document?

A. Yes sir. This is the criteria that we use for classifying our patients.

Q. Okay, I notice that there is a note down at the bottom of those classification standards. What does that note say?

A. The above criteria is used by the reviewing physician as a general framework only for the exercise of

professional judgment. It is not used in a checklist fashion or as a rigid criteria for approving or denying nursing home care or in the classification of those patients already approved residing in long term care facilities.

Q. What was the purpose of adding that note?

A. Well, I don't know, I don't recall seeing that note before.

Q. So that is not part of the standards that you formulate any way? Is that right?

A. The note is not, no sir.

Q. Alright, so someone else put that on there?

A. I don't know, I have no knowledge.

Q. Let me clarify it. Do you put it on there?

A. No sir, I did not.

Q. Dr. Brinkley, long were was that set of standards used by the State of Arkansas in the classification of the medicaid recipients in nursing homes?

A. From the time we revised the criteria, which was probably in 1972-71-72, in that general time frame, until the present time.

Q. Okay, let me ask you this, were the standards that are reflected on Defendant's Exhibit 11, standards that were in effect during the calendar year 1979?

A. Yes sir.

Q. Now, were you the one that actually made the classifications and determinations?

A. There were two of us. I was one that did it and I had another physician that helped me.

Q. Who was the other physician?

A. Dr. Robert Richardson.

Q. Alright, what information would be utilized by you and Dr. Richardson in classifying these medicaid patients in nursing homes?

A. Up to one point, we had the form that preceeded the present 703 form. Which was called an NH2, I believe. It contained essentially the same information that the current 703 form contains. It also contained a social worker's report, on each of these patients.

And the social worker was a part of the Welfare Department team in that county who saw that patient, wrote a note on the form and before it was submitted into me for the classification process. Now, I don't know what year the social worker stopped writing the report, but at some point, maybe in the early 70's and the social workers stopped writing reports and to the best of my knowledge this was for economical reasons. The reason given us at that time was that it was costing too much money to have a social worker go out and visit each of these patients and write this report for us. But back to the questions, the information contained in the NH2—the 703 told us about the ambulation, told us about their bladder and bowel control or lack of control. Told us about their feeding habit, told us about their mental status and told us about their personal or grooming habits. And then also reflected the amount of medication and the amount of treatments that the patients were receiving.

And up to that point, the social report went in, saw the patient and verified alot of this or if it did not verified, told us the disagreement. That was the information that I used.

Q. Okay, let me ask you this. Do you recall the approximate year when the State of Arkansas quit utilizing the social workers to go out and do their report?

A. I can only guess that it was in the early '70s.

Q. Early 70's?

A. I don't know for sure.

Q. Let me make this as quick and clear. Were these social workers being utilized during the calendar year 1979?

A. I don't think so.

Q. Were you still classifying patients in nursing homes in 1979?

A. Yes.

Q. Alright, where would the information that you used in classifying a patient, where did that come from?

A. That information came from the nursing home.

Q. Alright, did it come from any other source?

A. Well, the physician reviewed and signs this information.

Q. Well, the point I am trying to get to, you would receive customarily a 703, right?

A. Yes.

Q. And that 703, if I understand it, would have this information on it, is that correct?

A. Yes.

Q. Do you know who complied the information on the 703s at Cumberland Lodge Nursing Home?

A. No, sir.

Q. But the information on the 703 form that was provided you came from the nursing home, is that correct?

A. Yes sir.

Q. Alright, in other words, what I am trying to clarify you or no one from your office went out there and did it yourselves, or compiled it for them?

A. That's correct.

Q. Okay, now, Dr. Brinkley, wouldn't, in my understanding this, would the patient classification then depend on the information conveyed solely by the nursing home?

A. Yes sir.

Q. Alright, was that true in 1979?

A. Yes sir.

Q. Alright, now, if you were going to classify a nursing home patient in 1979, whether it be one from Cumberland Lodge or somewhere else, how would you go about doing that?

A. Well, the procedure was—I would find the 703 and determine what each section, for instance the—do you have a blank 703?

Q. Yes, I do?

A. May I look at it? In the degree of incapacity patient, you look and it is obvious that you would take into account how much degree of incapacity the patient was reported to have. This would certainly bear heavily on your decision. The other thing that would bear heavily would be what was the patient doing in regard to controlling his own body wastes. The patients varied from having no control over their bowels and bladder to good control of bowels and bladder and I think this would be reflected here under the continence status.

Under grooming, you looked at this and this gave an idea as to what their general degree of help that the nursing service could expect to receive from the patient. Then you look at the mental status and again we see that it responses here, it can be responded as a clear to needs restraints. And then the graduation in between. So you would have to exercise some judgment as to what was being told you and how to apply it into the criteria that we were using. We did not have—and then over on the next page you would look at the feeding and here again, the feeding explanation could be all the way from a person who fed himself and took care of himself that way or had to be fed by things other than by mouth and the grades between.

There was an area here that the nurses could make a comments, and we always invited the nurses to make comments and trying to arrive at the proper classification. Because there are times when you can't just make a check list to completely express yourself in regard to what a person needs.

Q. Based on the matter in which you classified nursing home patients, what page of that form would contain the most important information?

A. The most information is contained on the first page, the front page.

Q. Alright, what section of the form contains the most important information?

A. That is part I, II or—?

Q. Well, just the captioned, how it is captioned on the form will be fine?

A. Well, the degree of incapacity.

Q. That is what you are trying to determine isn't it?

A. Yes.

Q. Let me ask you this, customarily in the classification of medicaid patients in Arkansas nursing homes would you as a reviewing physician have to refer to the second page in the majority of the cases?

A. You always referred to the second page, —mostly because you had to find out about the feeding, this was certainly significant. But it was on the second page that you would expect to find comments, if the nurse was going to write comments to you, this is where you would expect to find them.

Q. Okay.

A. But primarily, I think other than the feeding most of your classification was done from the first sheet and the very top part of the second sheet.

Q. Okay, so if I understand you, in your own mind, the most siginficant information on this 703 form is the degree of incapacity section, is that right?

A. Yes sir.

Q. Correct me if I am misleading the facts. Is that right?

A. That is correct.

(Recess)

BY MR. GOVAR:

Q. Dr. Brinkley, I think prior to the recess we were discussing the classification of medicaid patients in nursing homes and you were telling us about the information that was used by you in the classification of those patients. Now, did you ever have occasion in the classification process to resort to information other than the information contained on the 703 form?

A. Well, of course the social report, we used that routinely until it was discontinued. There had been instances and these were not very often but there were instances where you felt that there was a lot of indecision about the classification and you would ask for more information or we would ask for one of our district nurses to go into the home, see the patient and at some point, we would even ask for the nurses' notes to be sent at times.

Q. Alright, at this time I would like for you to refer to a document marked as Government's Exhibit 2, it is in front of you, let's get all of that stuff out of your way. By the way are these 703 forms kept in the course of business at the Arkansas Social Services of Long Term Care?

A. Yes.

Q. They are official government records then?

A. Yes.

Q. Alright, now if you will refer to Government's Exhibit 2 and identify the patient?

A. Murray is the last name and GRAYCE or GROYCE is the first name. But Murray is the last name.

Q. Have you had the opportunity to review the medical records, pertaining to the patient Grayce Murray during the period of July and August of 1979?

A. These were a group of records that I reviewed at your request, nurses notes and the nursing home records.

Q. Alright, how many times have you reviewed those records? You had reviewed them prior to the time that I requested you to review them, had you not?Mr. Lucas asked you?

A. Yes.

Q. In 1980?

A. Mr. Lucas asked me to look at them, yes sir.

Q. Was that prior to the time that I asked you to review them?

A. Yes sir.

Q. Alright, now based on—what information did you review—specifically with respect to the patient Grayce Murray?

A. Well, I reviewed the nurses' notes, treatment records, I think if I had one of them before me I could be specific.

Q. Alright, do you make notes based on your review?

A. Yes sir.

Q. How did you make those notes?

A. If I recall I dictated the – those notes and gave you – gave your office the –

Q. Why don't you refer to your notes so that you can refresh your memory?

A. Yes sir.

Q. Alright, how did you compile those notes, those transcribed notes there, how did you compile those? Did you make those notes or did you say those things as you went through the medical records?

A. I dictated these as I went through them. Went through the records.

Q. Okay, do you have an independent recollection of the materials that you have stated on those notes?

A. No – I don't know them specifically for each patient by memory, I recollect that this is what I did.

Q. Your Honor, I would like to have this marked as Government's Exhibit 13?

THE COURT: Alright, Mr. Lessenberry, any objections?

MR. GOVAR: Your Honor, I think we can work it out different way.

BY MR. GOVAR:

Q. Let me ask you this Doctor Brinkley, would you refer to Government's Exhibit 2, how did you perform a process of reviewing the medical records in July and August of '79, pertaining to the patient Grayce Murray? How did you go about doing that?

A. From the 703 on Grayce Murray, that was dated August 1, 1979, they show her as sits on side of bed, sits up in chair part time with total help for all the grooming needs, show her to be partially incontinent with marked confusion, needing a supervisor for personal safety and hyperactive, with some help needed for eating.

And on the basis of that I classified her as being an intermediate care, intermediate care.

Q. And when was that classification made?

A. Well, I don't have the classification sheet date, but the date of the request was 8/1/79 here.

Q. Okay, when initially saw that 703 you classified the patient Grayce Murray as a "B" patient or intermediate care patient, is that right?

A. Yes sir.

Q. And upon what basis was that classification made?

A. Okay, with grooming for instances, total help was needed for the patient, with the ambulation, there was no ambulation noted here at all. The patient was noted to sit up on the side of the bed or to sit in a chair only part time. There was no notification here of walking alone or walking with a cane or walking with help, at all. Then when it came to the continent status, the patient was noted to be partially incontinent. Which in my judgment I take to mean doesn't have complete control of the bladder and bowel. Then under mental status, markedly confused, needs supervisor for safety and hyperactive.

This was certainly not a clear or somewhat confused patient, this was really a patient that needed watching very carefully.

Q. And that is based on the information that was submitted to you by the nursing home on the 703 form?

A. Yes sir.

Q. Did you have any way of knowing whether that information was correct at the time it was submitted?

A. Well at the time this was submitted, I just had to take what was given me as being correct.

Q. Okay, you took their word for it?

A. Yes sir.

Q. Alright, now excuse me just a—marked as Government's Exhibit 13.

MR. LESSENBERRY: Your Honor there is no objection to Government's Exhibit 13 or any of the following Government's Exhibits that relate to the 704—or 703s, excuse me.

BY MR. GOVAR:

Q. Now, Dr. Brinkley, did you prepare your own 703 based on your review of the nurses notes and medical records pertaining to Grayce Murray during July and August of 1979?

A. I did it in retrospect.

Q. Okay.

A. It was during the year 1981 that I did this.

Q. Okay—

A. But I did this, I did prepare—I did fill out a 703 as I felt it should be filled out and—

Q. And what was your 703 marked as Government's Exhibit 13 based on?

A. It was based on a review of nursing notes and the daily reports of activities in the nursing home record that I reviewed.

Q. Okay, now would you compare Government's Exhibit 13 by the way, what patient does Government's Exhibit 13 pertain to?

A. Grayce Murray.

Q. Alright, would you compare Government's Exhibit 13 with Government's Exhibit 2?

A. Yes.

Q. Does Government's Exhibit 2 also pertain to Grayce Murray?

A. Yes.

Q. Alright. Now.

A. On Government Exhibit 2 on the degree of incapacity, she was shown to sit on the side of the bed and sits in a chair part time. I found that she walked alone.

Q. She walked alone?

A. Yes.

Q. Okay.

A. And on continence status, I found that they reported that she was partially incontinence and I found that she not incontinence.

Q. Alright.

A. And of course, this was in a time frame from July 10 til August 10—

Q. Of what year?

A. 1979 that I reviewed. To base this on.

Q. Alright.

A. And in grooming I found that she needed partial help with all of her grooming requirements.

Q. What did Government's Exhibit 2 reflect with respect to her grooming needs or assistance?

A. Well, that she needs total help with all grooming needs.

Q. Based on your review of the medical records in the nursing home, does Government's Exhibit 2 accurately reflect the needs of Grayce Murray?

A. No sir—

Q. During July and August of 1979?

A. No sir, I don't think so.

Q. Alright, would you refer to the second page?

A. Now on the second page I found that from the nursing notes that Grayce Murray fed herself. In comparison with some help needed. On Government's Exhibit 2, on my determination she fed herself.

Q. Okay, now let's go to mental status on Government's Exhibit 2. What check marks are under mental status on Government's Exhibit 2?

A. Markedly confused, needs supervisor for personal safety and hyperactive.

Q. Alright, did you have any of those things checked on the 703 form that you prepared after reviewing the medical records?

A. I have moderately confused, markedly confused and needs restraint.

Q. Alright, is the information under medical – mental status on Government's Exhibit 2 consistent with the medical records and the nursing notes for that patient during July and August of 1979?

A. They were somewhat similar.

Q. Somewhat similar?

A. Yes sir.

Q. You didn't have quite as many check marks?

A. I did not find as much variation in the mental status between my going over the nursing notes as was checked on Exhibit 2?

Q. Alright, let me ask you this Doctor, based on your experience and your familiarity with the State's standards governing the classification of medicaid recipients in Arkansas nursing homes and based on your review of the medical records pertaining to the patient Grayce Murray during July and August of 1979, is the information contained on Government's Exhibit 2 under the section captioned degree of incapacity an accurate reflection of the patient's physical needs or physical condition?

A. No sir.

Q. Now if you will—Your Honor, I move for the admission of Government's Exhibit 13?

THE COURT: Alright, I think Mr. Lessenberry has indicated that he has no objection.

MR. GOVAR: About this?

THE COURT: Let it be received.

(thereupon Government's Exhibit No. 13 was received in evidence)

BY MR. GOVAR:

Q. If you will Dr. Brinkley, would you please refer to Government's Exhibit 3? What patient does that document pertain to?

A. Thomas Cassidy.

Q. Alright, and what is the date of that 703, or what date was the request made?

A. July 31, 1979.

Q. Alright, did you follow the same procedure with the patient Thomas Cassidy as you followed with the patient Grayce Murray?

A. Yes sir.

Q. Did you review the notes—the nurses' notes and the medical records from Cumberland Lodge Nursing Home for the period of July and August of 1979?

A. Yes sir.

Q. And did you fill out that 703 form as you reviewed those records?

A. Yes sir.

Q. For the period of July and August of 1979? Would you find that in that file folder for us please?

A. Yes, I think that is it right there.

Q. Your Honor, I would like to have this marked for identification as Government's Exhibit 14. Now, if you will, would you compare—well let's just do it this way. Under the section of Government's Exhibit 3, captioned degree of incapacity, what is checked under the part captioned bedridden?

A. Bedfast-part time, sits up in chair part time, walks with the help of handrails.

Q. Alright, did you in your review of the medical records pertaining to the patient Thomas Cassidy find that to be an accurate reflection of his physical condition?

A. No sir.

Q. What did you find?

A. I found that he walked alone.

Q. Alright, now what does Government's Exhibit 3 reflect with respect to the care or assistance that Mr. Cassidy needed in his grooming?

A. They have marked that he needs total care. Total help with his grooming.

Q. Okay.

A. And that is in all phases of his grooming—

Q. Tub bath?

A. Tub bath, bed bath, shower, dressing shaving and care of his hair.

Q. Alright, now based on your review of the medical records and nurses notes for July and August of 1979, for patient Thomas Cassidy, does Government's Exhibit 3 accurately reflect the needs of patient Thomas Cassidy?

A. No, sir.

Q. In your opinion is that information incorrect or false?

A. I think the information is incorrect, on the Government Exhibit 3.

Q. Now, what about the continent status of the patient Thomas Cassidy on Government's Exhibit 3?

A. He is reported to be partially incontinent.

Q. Alright, what did you find as to your review of the records?

A. I found that he was not incontinent.

Q. Alright, does Government's Exhibit 3 accurately reflect the continence status of Thomas Cassidy during July and August of 1979?

A. No, sir.

Q. Alright, what about the mental status of Thomas Cassidy on Government's Exhibit 3?

A. On Exhibit 3 it is marked, markedly confused, needs supervisor for personal safety and hyperactive.

Q. Hyperactive. Okay, let me ask you this Doctor, did you form any opinion or make any conclusions based on your review of Mr. Cassidy's records during July and August of 1979?

A. I found the records to reflect that he be clear to somewhat confused.

Q. Now would you refer to the diagnosis part, Part II of Government's Exhibit 3?

A. Schizophrenia paranoia and chronic emphysema.

Q. Chronic emphysema. That is under the diagnosis part of Government's Exhibit 3?

A. Yes.

Q. Now, would you explain to the ladies and gentlemen of the jury what hyperactive means?

A. Hyperactive means overactive, more activity than normal.

Q. What in terms of physical activities?

A. Physical or mental activity, usually it is a combination of both, it could be a combination of both. But would be more active than normal.

Q. Let me ask you a doctor's question. Does chronic emphysema constitute with hyperactivity?

A. It could be. Yes sir.

Q. It could be?

A. Yes sir.

Q. Did your review of Thomas Cassidy's records during the periods of July and August of 1979, of the medical records of Cumberland Lodge, indicate to you that he was hyperactive?

A. No, sir.

Q. Alright, what about the ability of the patient to feed himself during July and August of 1979? What does Government's Exhibit 3 reflect?

A. That some help was needed.

Q. Alright, what was your findings in that regard?

A. I found that he could feed himself.

Q. Dr. Brinkley, based on your familiarity with State standards classifying medicaid patients in Arkansas nursing homes, and on your review of the medical records and nurses notes pertaining to the patient Thomas Cassidy during July and August of 1979, do you have an opinion with respect to the accuracy of the information on that portion of the form marked Government's Exhibit 3 under the section of degree of incapacity?

A. I don't think it is accurate information.

Q. Now, if you will Dr. Brinkley, would you please refer to Government's Exhibit — Your Honor, I would like to admit Government's Exhibit 14.

THE COURT: Alright, let it be received.

(Thereupon Government's Exhibit No. 14 was received in evidence)

BY MR. GOVAR:

Q. Now, if you will, please refer to Government's Exhibit 4. What patient does that pertain to?

A. Glen Morton.

Q. Alright, what is the date of the 703 marked as Government's Exhibit 4?

A. 7/31/79.

Q. Alright, did you review the records pertaining to the patient, Glen Morton's medical records during the period of August and July of 1979?

A. Yes sir.

Q. Alright, did you prepare a 703 on your own in the same manner as the previous patient?

A. Yes sir.

Q. Your Honor, I am having this marked Government's Exhibit 15. If you would, I know we are getting a lot of paper up here. Under the document marked Government's Exhibit 4, under the section of degree of incapacity, what has been checked under the part bedridden?

A. Bedfast, sits up in chair part-time, walks with a cane and walker and walks with the help of an attendant.

Q. Okay, based on your review of the medical records and the nurses notes at Cumberland Lodge Nursing Home during the period of July and August of 1979, what were your findings with respect to Glen Morton's ability or bedridden condition? Did you find him to be bedfast?

A. No, I found that he walked alone.

Q. Okay, did you find that he walked with crutches or something like that or with the help of an attendant?

A. No, I think that he just walked alone.

Q. He just walked by himself?

A. Ugh—I noted that ugh—self care, up and about in the halls, at lived to the dining room for meals, ambulatory ugh—self care.

Q. Okay, now on Government's Exhibit 4 what level of care is indicated with respect to Glen Morton's grooming needs?

A. He had total help checked on all categories there.

Q. Based on your review of the medical records and nurses notes of Glen Morton during July and August of 1979, were those check marks justified?

A. No. I found that he needed no help with those things.

Q. Alright, now let me ask you this, what does Government's Exhibit 4 reflect with respect to the continence status of the patient Glen Morton?

A. Partially incontinent.

Q. What did your review of the records reflect on the 703?

A. That he was not incontinent.

Q. What about the mental status of the patient. What does Government's Exhibit 4 reflect with respect to his mental status?

A. Markedly confused, needs supervisor for personal safety and hyperactive.

Q. Did you find any of those things to be true during your review of the medical records and nurses notes pertaining to Glen Morton?

A. No sir.

Q. What did you find his mental status to be based on review of the nurses notes and the medical records of Cumberland Lodge Nursing Home?

A. He was clear.

Q. What about the patient's ability to feed himself?

A. I found that he could feed himself. On the Exhibit 4, he is reported to need some help.

Q. Your Honor, I move for the admission of Government's Exhibit 15.

THE COURT: Alright, let it be received.

(thereupon Government's Exhibit No. 15 was received in evidence)

BY MR. GOVAR:

Q. Dr. Brinkley based upon your familiarity with the standards governing classification of medicaid patients in Arkansas nursing homes, upon review of the medical records and nurses notes pertaining to the patient, Glen Morton, during July and August of 1979, does the information reflected under that portion of the form degree of incapacity marked as Government's Exhibit 4, does that accurately reflect that patient's condition?

A. No.

Q. Does it accurately reflect his needs in terms of care?

A. No.

Q. Now, Dr. Brinkley, I would like to clarify a point here. Nursing home patients need some care, do they not?

A. Yes sir.

Q. All nursing—

A. Surely.

Q. They wouldn't be there if they didn't need some care?

A. That's right.

Q. So what we are talking about here, we are talking about how much care they need, is that right?

A. The level of care, yes sir.

Q. Alright, Dr. Brinkley, if you will now, please refer to Government's Exhibit 5. What patient does that pertain to?

A. Mary Welch.

Q. Alright, have you had an opportunity to review the medical records at Cumberland Lodge Nursing Home during July and August of 1979 pertaining to the patient Mary Welch?

A. Yes sir.

Q. Alright, Your Honor, I am having marked for identification Government's Exhibit 16. Now, did you follow the same procedure with this patient, Mary Welch, as you have with the others, did you prepare a 703 form as you went through the medical records?

A. Yes sir.

Q. Alright, what does Government's Exhibit 5 reflect with respect to Mrs. Welch's—let's back up on this a minute. What is the date on the 703 marked as Government's Exhibit 5?

A. 7/31/79.

Q. Alright, and that is the one submitted to your office by the nursing home, is that right?

A. Yes sir.

Q. Okay, now what does Government's Exhibit 5 reflect with respect to whether or not Mrs. Welch was bedridden?

A. She—bedfast is checked, sits up in a chair part time, must be lifted into chair and walks with help of attendants.

Q. Alright, now based upon your review of the nurses notes, the law, and the medical records at Cumberland Lodge Nursing Home for patient, Mary Welch, during the period of July and August of 1979, did you find Mrs. Welch to be bedfast?

A. No, sir.

Q. Did you find that she needed help to—or that she had to be lifted into a chair?

A. No sir, when I reviewed the nurses notes for July and August, I made the statement it is my opinion that this patient walks alone most of the time and needs at the very most partial help. Lots of time needs very little or no help.

Q. Alright, now with respect did you find based on your review of her records, that she walked alone?

A. Yes.

Q. Or could walk alone?

A. She walked alone.

Q. Now what about Mrs. Welch's grooming needs on Government's Exhibit 5? What does that form reflect?

A. Total help in all the categories.

Q. Total help in all areas?

A. Yes sir.

Q. Those check marks justified by your review of the medical records pertaining to that patient during July and August of 1979?

A. No, sir.

Q. Does your opinion, what is your opinion with respect to the information on patient, Mary Welch, under grooming needs and care?

A. Tub bath, bed bath, she needed only partial help. For dressing and care of hair needed partial help.

Q. Okay, now you did not find that she needed total help in any of those areas?

A. No, sir.

Q. Alright, what about her incontinence or continence status on Government's Exhibit 5? What is checked?

A. Yes and partially.

Q. Did you find her to be partially incontinent based on your review of the medical records?

A. I found her not to be incontinent.

Q. On Government's Exhibit 5 under the category mental status, what is checked off?

A. Markedly confused, needs supervisor for personal safety and hyperactive.

Q. Alright, I believe you told the jury what hyperactive means in the medical language. Let me ask you this, Government's Exhibit 5 also reflects that the patient, Mary Welch is bedfast, is that not right?

A. Yes sir.

Q. And that she had to be lifted into a chair, is that right?

A. Yes sir.

Q. Is that consistent with hyperactivity?

A. You wouldn't think of the two going together, no sir.

Q. Well, I mean just—

A. To be bedfast you would not ordinarily think of a hyperactive person being bedfast.

Q. Okay, and all that information is on the first page of Government's Exhibit 5?

A. Yes sir.

Q. Alright, let's refer to the patient's ability to feed herself, on the second page of—what is checked off on the second page of Government's Exhibit 5 with respect to the patient, Mary Welch?

A. Some help needed.

Q. What did you check off as to her ability to feed herself?

A. I found that she could feed herself.

Q. Dr. Brinkley, based on your familiarity with the standards governing the classification of medicaid patients in Arkansas nursing homes, and your review of the medical records, nurses notes and daily log at Cumberland Lodge Nursing Home pertaining to the patient, Mary Welch, during the period of July and August of 1979, do you have an opinion as to the accuracy of the information set forth under the section of degree of incapacity on Government's Exhibit 5?

A. I don't think Exhibit 5 is accurate.

Q. Okay, is that the form that was submitted by the nursing home?

A. Yes sir.

Q. Alright, Your Honor, we move for the admission of Government's Exhibit 16.

THE COURT: Alright, let it be received.

(Thereupon Government's Exhibit No. 16 was received in evidence)

BY MR. GOVAR:

Q. If you will Dr. Brinkley, please refer to Government's Exhibit 7. What patient does Government's Exhibit 7 pertain to?

A. Catherine Yaniger.

Q. What date was that form submitted by the nursing home to the office of Long Term Care?

A. 7/31/79.

Q. Did you follow the same procedure in reviewing the medical records and nurses notes in the case of Ms. Yaniger as you have the previously patients?

A. Yes, sir.

Q. And did you review the nurses notes, and the logs and the medical records at Cumberland Lodge Nursing Home?

A. Yes, sir.

Q. And were those records for July and August of 1979?

A. Yes, sir.

Q. Alright, now on Government's Exhibit 6, what is checked under the part of the form captioned bedridden?

A. Bedfast, sits up in chair part time and under ambulation, walks with the help of attendants.

Q. What did you find with respect to the bedridden status of Catherine Yaniger during your review of her medical records? Did you find her to be bedfast?

A. No.

Q. Alright, what did you find about her ability to walk, to ambulate?

A. She walked with a walker.

Q. Okay, now under—on Government's Exhibit 6 under that portion of the form captioned grooming, how much help is indicated for the patient to attend to her grooming aids?

A. She is marked as requiring total help with her grooming in all the categories except shaving.

Q. What did your review of the medical records and nurses notes for Catherine?

A. I find that she—she need partial help with her bed bath and I did not check any more under grooming on my 703 that I made out. But in my dictation as I went through the chart, on 7/25/79 up and at dining room for meals, ate it all for the food, sponge bath, oral hygenie and skin care she is alert, no complaints, up and about as desired.

Q. Now, let me ask you this on Government's Exhibit 5, under the portion of the form captioned continence status, excuse me that is Government's Exhibit 6, what is checked off?

A. Under continence, partially.

Q. Alright, what did you find to be the continence status of the patient to be based on your review of the records?

A. Not incontinent.

Q. On Government's Exhibit 6, what is checked off with regard to the patient's mental status?

A. Markedly confused, needs supervisor for personal safety and hyperactive.

Q. What did you find the patient's mental status to be based on your review of the medical records?

A. Clear.

Q. Alright, now this is the patient, Catherine Yaniger?

A. Yes sir.

Q. Government's Exhibit 6 indicates, does it not, that patient was also bedfast? Is that correct?

A. Yes.

Q. It also indicates that this patient was hyperactive, is that correct?

A. Yes.

Q. Now, I am going to ask you this again and, are those two consistent with one another?

A. I wouldn't think they would be consistent with each other, no sir.

Q. Your Honor, I move for the admission of Government's Exhibit 17.

THE COURT: Alright, let it be received.

MR. GOVAR: Alright.

(Thereupon Government's Exhibit No. 17 was received in evidence)

BY MR. GOVAR:

Q. Dr. Brinkley in—based on your familiarity of the standards governing the classification of medicaid patients in Arkansas nursing homes and your review of the medical records, the logs and nurses notes pertaining to Catherine Yaniger during the period of July and August of 1979? Do you have an opinion with respect to the accuracy of the information contained in that portion of Government's Exhibit 6 captioned degree of incapacity?

A. I think it is inaccurate.

Q. Now if you will Dr. Brinkley, would you please refer to Government's Exhibit 7? What patient does that refer to?

A. Johnny Gidron.

Q. Johnny Gidron or Gidron?

A. Gidron, maybe it is Gidron.

Q. What date is on Government's Exhibit 7, what date was it submitted by the nursing home?

A. 7/31/79.

Q. Okay, what does that 703 marked as Government's Exhibit 6-7 reflect to the status of the patient Johnny Gidron?

A. On the degree of incapacity, it is marked bedfast, sits on side of the bed, sits up in chair part time, and walks with a walker.

Q. Okay, Dr. Brinkley, would you agree with the statement that people's physical condition change from time to time during a period of time?

A. Yes sir.

Q. During the period that we are concerned about here with, is that the period that you reviewed the records both when I asked you to and the previous time when Mr. Lucas had asked you to, did you found Mr. Gidron's physical condition to change at some point where he might become a legitimate "B" classification patient?

A. No, sir.

Q. You didn't ever find him to change?

A. No, sir.

Q. Okay, now not even later—

MR. LESSENBERRY: Third time Your Honor, I object.

THE COURT: Wait, Mr. Govar?

MR. GOVAR: Your Honor, may he have a moment to refresh his memory from his notes?

MR. LESSENBERRY: I think the witness has gotten the message.

BY MR. GOVAR:

A. From my notes I find that his mental status clear, feed himself, ambulatory, watching T.V. in the day room, comfortable in bed and up watching T.V. in the day room to the dining room for supper, to the dining room for meals, able to walk without a walker, he is ambulatory, self care. I did not find that he had a change in his condition.

Q. Do your notes reflect whether Mr. Gidron had a disease or disorder of some kind?

A. Well, on his—on the NH—703, Exhibit 7, he is shown to have carcinoma rectum, and arteriosclerosis and post hip fracture.

Q. Did you find that the presence of one of those diseases during your review of the medical records?

A. Showing on my review of the charts, I show him to have cancer of the rectum and post hip fracture.

Q. Okay, let me ask you this, your notes that you are referring to now were based on a review of the records for July and August of 1979? Is that not correct?

A. Yes sir.

Q. Now, do you recall how many records or what records you reviewed when Mr. Lucas asked you to review them back in 1980? That was all of the records?

A. I reviewed all of the records, a greater—a great number of records.

Q. More than just the two months that you reviewed for these notes?

A. Yes sir.

Q. Alright, is it possible that after August of 1979, after the time that you reviewed the records, that Mr. Gidron got worst?

A. It is certainly, you would expect him at some point in his disease to start getting progressively worse with the disease of cancer of the rectum, yes, sir.

Q. Could that be a fairly rapid occurrence, with that kind of cancer?

A. A change, there is a number of complications with cancer of the rectum, bleeding being the most prominent one that could change within a very short time, and become very very serious in a very short period of time. It could require hospitalization—ugh—that a complete change from the day before for instance.

Q. Okay, now on Government's Exhibit 7, under degree of incapacity, that portion of the form captioned bedridden, what is checked?

A. Bedfast, sits on side of bed, sits up in chair part time, and walks with a walker.

Q. Do you recall from your review of Mr. Gidron's records during July and August of 1979, whether he was bedfast?

A. I found him to walk alone.

Q. Now, is there a difference between the bedridden column and the ambulation column?

A. Excuse me, I am sorry, I did not find him bed— to be bedfast.

Q. Okay, now what does that word "bedfast" mean, does that mean that you are in the bed all the time, can't get up or?

A. No sir, in the sense that we use the word "bedfast" with our classification scheme, if you—if you can be placed in a wheelchair or be placed up in a chair, ugh—you—this is still consistent with the class—with the notation of being bedfast.

Q. Based on your review of Mr. Gidron's records for the months of July and August of 1979, did you find him to be bedfast?

A. No sir, I did not.

Q. What about his ability to ambulate or walk? What does Government Exhibit 7 reflect in that regard?

A. He is shown walking with a walker?

Q. What about the amount of care or assistance that Mr. Gidron required for his grooming? What does Government's Exhibit 7 reflect in that regard?

A. He is marked total care—total help in all the phrases of grooming.

Q. Based on your review of the medical records for the months of July and August of 1979, what level or amount of assistance did you assign Mr. Gidron to need for his grooming?

A. I found that he needed no help.

Q. No help with a bath or shaving or—

A. With a bath, bed bath, shower bath, dressing, shaving or care of hair.

Q. Now with respect to Government's Exhibit 7, what is indicated as the continence status of the patient?

A. It is marked partially.

Q. Alright, did you find that to be true based on your own review of the medical records during August and July of 1979?

A. No.

Q. What did you find to be the case?

A. I found that he was not incontinent.

Q. Okay. Under the portion of the 703 captioned mental status, ughh—on Government's Exhibit 7 what is indicated as the patient's mental status there?

A. Markedly confused, needs supervisor for personal safety and withdrawn.

Q. What did you find to be his mental status during July and August of 1979 based on your review of his medical records in the nursing home?

A. Clear.

Q. On Government's Exhibit 7, what is checked off with respect to his ability to feed himself?

A. Some help needed.

Q. What did you find?

A. That he could feed himself.

Q. Alright, do you have the nurses notes or the medical records to back that up?

A. I reviewed the nurses notes.

Q. Was it for July and August of 1979?

A. Yes, sir.

Q. In the normal course of treatment of the patient, this may be an unfair question to a doctor, who normally would spend more time with an individual patient, a nurse or a doctor? I am talking about on a daily basis?

A. I think the nurses would spend more time with the patient.

Q. Dr. Brinkley, based upon your familiarity with the standards governing the classification of nursing home patients in Arkansas, for the year 1979, and based on your review of the medical records, nurses notes and logs, whatever for the patient, Johnny Gidron, during the months of July and August of 1979, do you have an opinion with respect to the information set out under degree of incapacity on Government's Exhibit 7?

A. I think it is inaccurate.

Q. Alright, Your Honor, I move for the admission of Government's Exhibit 18.

THE COURT: Alright, let it be received.

(Thereupon Government's Exhibit No. 18 was received in evidence)

BY MR. GOVAR:

Q. Dr. Brinkley, if you will, refer now to Government's Exhibit 8. What patient does Government's Exhibit 8 refer to?

A. Lola Turney.

Q. Alright, did you review Mrs. Turney's medical records and nurses notes, logs or whatever was available for the period of August and July of 1979?

A. Yes, sir.

Q. Were those the records that were kept at Cumberland Lodge Nursing Home?

A. Yes, sir.

Q. Alright, so you followed the same procedure for Mrs. Turney as you followed for the others?

A. Yes, sir.

Q. Reviewing the 703 based on your review of those records of that patient?

A. Yes, sir.

Q. Alright, now if you will, what does Government's Exhibit 8 indicate with respect to the bedridden status of the patient, Lola Turney?

A. Bedfast, sits up in chair part time.

Q. Alright, when was this particular form, Government's Exhibit 8, submitted to the office of Long Term Care?

A. 7/31/79.

Q. Alright, what did you find on your review of the medical records in August and July of 1979 pertaining to the patient, Lola Turney?

A. I did not find that she was bedfast, I did find that she walked alone.

Q. Alright, what is checked off on Government's Exhibit 8, under the patient's ability to ambulate or walk?

A. Exhibit 8 has walks with a walker and walks with the help of attendant.

Q. Walks with walker and walks with help of an attendant? Now, and you did not find that the same to be true, is that correct?

A. That is correct.

Q. Now, what does Government's Exhibit 8 reflect with respect to the amount of assistance or care that Mrs. Turney needed to accomplish her personal grooming?

A. On Exhibit 8, it is marked total care for tub bath, bed bath, shower bath, dressing and care of hair.

Q. Okay, what did you find to be the amount of care or assistance that Mrs. Turney needed based on your review of her medical records in July and August of 1979?

A. For tub bath she needed partial help and bed bath partial help, shower bath, partial help, in dressing she need

no help at times and partial help at times, and care of her hair, she needed no help.

Q. Okay, with respect to continence status of this patient what does Government's Exhibit 8 reflect?

A. Partially incontinent.

Q. Did you find that to be true based on your review of the medical records pertaining to Lola Turney?

A. No, I found her to not be incontinent.

Q. Now, with respect to the mental status of the patient, Lola Turney, what does Government's Exhibit 8 reflect?

A. Markedly confused, needs supervisor for personal safety and hyperactive.

Q. Alright, what did you find to be her mental status based on your review of the medical records for July and August of 1979?

A. Clear.

Q. Clear? Alright, is Government's Exhibit 8 another case where we have a patient who is indicated that is supposed to be bedfast and hyperactive?

A. Yes, sir.

Q. Dr. Brinkley based upon your familiarity of the standards governing classification of the medicaid patients in Arkansas nursing homes, based on your review of the medical records, nurses notes and daily log entries compiled at Cumberland Lodge Nursing Home during the months of August and July of 1979, do you have an opinion as to the accuracy of the information under degree of incapacity on Government's Exhibit 8?

A. Yes sir, I think it is inaccurate.

Q. Thank you. Move for the admission of Government's Exhibit 19. Your Honor.

THE COURT: Alright, let it be received.

(Thereupon Government's Exhibit No. 19 was received in evidence)

BY MR. GOVAR:

Q. Now Dr. Brinkley, if you please, would you refer to Government's Exhibit 9, I believe it is. What is the name of the patient on that form?

A. William Moore.

Q. Alright, and what date was that form submitted to the Office of Long Term Care?

A. 7/31/79.

Q. Now, by the way, let me ask you about something so that we can be straight once and for all. What is the significance if you know, of this stamp on the back of these 703 form, marked Government's Exhibit 9?

A. I don't know.

Q. You don't know?

A. No.

Q. Now, let me ask you this, did you follow the same procedure with the patient, William Moore, as you did with the others we have been talking about?

A. Yes, sir.

Q. You, as I understand it, when through the records and prepared a 703 based upon the review of your review of the medical records?

A. Yes, sir.

Q. And you read the record for the month of July and August of 1979 pertaining to this patient, William Moore?

A. Yes, sir.

Q. Okay, was there a cut off date that you used in July for the records you reviewed on the patients?

A. I believe we started July 10 and went through August 10.

Q. July 10 through August 10?

A. Yes, sir.

Q. So when you are referring to the medical records that you reviewed, it would be the records in that period of time, is that right?

A. Yes, sir.

Q. July 10 through August 10?

A. Yes, sir.

Q. Now, with respect to the patient, William Moore, would you please refer to the degree of incapacity portion of Government's Exhibit 9? What is reflected as far as his status on being bedridden?

A. Bedfast and sits up in chair part-time.

Q. Alright, now based on your review of Mr. Moore's records, for the period you just indicated, did you find him to be bedfast?

A. No, sir.

Q. With respect to Mr. Moore's ability to walk or ambulate, what does Government's Exhibit 9 reflect?

A. That he walks with help of handrails.

Q. Okay, based on your own review of his medical records, for the period that you have indicated, what did you find with respect to his ability to ambulate or walk?

A. That he walked alone.

Q. Did you find that he needed any help at all?

A. I don't show my finding any help, no sir.

Q. With respect to the amount of assistance or care that Mr. Moore needed to attend to his grooming needs, what does Government's Exhibit 9 say?

A. Total help with grooming, tub bath, bed bath, shower bath, dressing, shaving and care of hair.

Q. Okay, did you find Mr. Moore to need that leval of assistance or care based on your review of his records?

A. No, sir. I found that he needed partial help with dressing.

Q. Okay. Now with respect to the continence status of the patient, William Moore, what does Government's Exhibit 9 reflect?

A. That he was partially incontinent.

Q. Did you find that to be the case based on your review of the records?

A. I found that he was not incontinent.

Q. Okay, now with respect to Mr. Moore's mental status, what does Government's Exhibit 9 reflect?

A. Markedly confused, needs supervisor for personal safety and hyperactive.

Q. What did you find to be his mental status based on your review of this patient?

A. Clear.

Q. Alright, now is Mr. Moore, does Government's Exhibit 9, is that another case where the patient is shown to being both bedfast and hyperactive?

A. Yes, sir.

Q. Okay, move for the admission of Government's Exhibit 20, Your Honor.

THE COURT: Let it be received.

(Thereupon, Government's Exhibit No. 20 was received in evidence)

BY MR. GOVAR:

Q. Now, based upon your familiarity with the Arkansas standards governing classification of patients in Arkansas nursing homes, your review of the medical records for the period of July 10, 1979 through August 10, 1979, the nurses notes and daily log entries of Cumberland Lodge Nursing Home, do you have an opinion as to the accuracy of the information set out in the degree of

incapacity on Government's Exhibit 9 pertaining to the patient, William Moore?

A. Yes, sir. I think it is inaccurate.

Q. Alright, is it your opinion that the information marked on Government's Exhibit 9 clearly reflects the amount of the assistance that that patient needed?

A. No sir, I didn't find that he needed this much assistance.

Q. I said would you agree that the level of care that was required by a patient would depend upon their physical condition or degree of incapacity if you want to put it that way?

A. Yes, sir.

Q. Alright, was that what nursing homes in Arkansas were paid for in 1979, the amount of care they provided for the medicaid patient?

A. Yes, sir.

Q. Okay, if you will Dr. Brinkley, please refer to Government's Exhibit 10. Now what patient does that pertain to?

A. Myrtle Knight.

Q. What is the date of the submission on the 703 form?

A. 7/31/79.

Q. Alright, now let me see if I can speed this up a little bit. Now did you review the medical records pertaining to the patient, Myrtle Knight for the period of January—July, 1979 through August 10, 1979?

A. Yes, sir.

Q. Did you follow the same procedure for this patient that you had with the others?

A. Yes, sir.

Q. When you went through the medical records did you fill out a 703 form as you felt that it should have been filled out?

A. Yes, sir.

Q. Alright, now, let me ask you what does Government's Exhibit 10 reflect with respect to the bedridden status of the patient, Myrtle Knight?

A. Bedfast, sits on the side of bed, sits up in chair part time.

Q. Alright, now what did you find to be Mrs. Knight's status based on your review of the records with respect to the category of bedridden?

A. I did not find her to be bedridden.

Q. You did not find her to be bedridden? Alright, what about her ability to walk, what does Government's Exhibit 10 reflect with respect to ambulation?

A. Walks with the help of attendants, uses wheel chair with help.

Q. What did you find to be her ability based on your review of the medical records from July 10, 1979 to August 10, 1979?

A. I found that she walked alone.

Q. Alright, what does Government's Exhibit 10 reflect with respect to the amount of assistance and care that she needed in accomplishing her personal grooming?

A. For a tub, bath, bed bath, shower bath, and dressing and care of hair, it is marked total help.

Q. Did you find that to be the case based on your review of her records?

A. No, sir.

Q. What did you find that she required assistance with?

A. She needed partial help with her tub bath.

Q. Is that the only thing that she needed help with?

A. Yes, sir.

Q. What about her continent status? What is reflected on Government's Exhibit 10?

A. She is listed as partially incontinent.

Q. Partially incontinent?

A. Yes.

Q. Did you find her to be partially incontinent based on your review of the records?

A. No, sir.

Q. What did you find in that regard?

A. That she was not incontinent.

Q. Now, would you tell the ladies and gentlemen, we may have covered this, are you talking about bladder control and that kind of thing on continent—

A. We are talking about bladder and bowel control.

Q. Let me ask you this as a doctor, do you agree that all elderly people, or to some extent are partially incontinent?

A. No, sir.

Q. You do not agree with that?

A. No, sir.

Q. Now, under mental status, what is reflected on Government's Exhibit 10 with respect to the mental status of or status of Myrtle Knight?

A. Markedly confused, needs supervisor for personal safety and withdrawn.

Q. Did you find any of those to be the case based on your review of the record?

A. No, sir.

Q. What did you find to be the mental status in July and August of 1979?

A. She was clear.

Q. What about her ability to feed herself? Or the level of care that she required in that? What does Government's Exhibit 10 reflect?

A. Say the question again.

Q. Okay. What does Government's Exhibit 10 reflect with respect to Mrs. Knight's, I think, yes, Mrs. Knight's ability to feed herself?

A. There is no marking—no mark on their form.

Q. It doesn't say anything does it?

A. No, it doesn't.

Q. What did you find to be the case based on your review of her records?

A. I found that she could feed herself with some help needed occasionally.

Q. Your Honor, I move for the admission of Government's Exhibit 21.

THE COURT: Alright, let it be received.

(Thereupon Government's Exhibit No. 21 was received in evidence)

BY MR. GOVAR:

Q. Now, Dr. Brinkley, based on your familiarity with the standards governing the classification of medicaid patients in Arkansas during 1979, and based upon your review of the medical records, the nurses notes and the daily log entries at the Cumberland Lodge Nursing Home, pertaining to the patient, Myrtle Knight, for the period of July 10, 1979 through August 10, 1979, do you have an opinion as to the accuracy of the information set forth under that portion of Government's Exhibit 10 captioned degree of incapacity?

A. Yes sir, I think it is inaccurate.

Q. Thank you, boy that was a mouth full wasn't it. Alright, Dr. Brinkley, would you please refer to Government's Exhibit 11? What is the name of the patient?

A. Sreathie Huett.

Q. Alright, what is the date on submission on the date of the form marked Government's Exhibit 11?

A. 7/31/79.

Q. 7/31/79. Alright, did you follow the same procedure with respect to the patient, Sreathie Huett, as you did on the other patients?

A. Yes, sir.

Q. Did you review the medical records, the nurses notes and the daily log entries in the same manner as the other patients?

A. Yes, sir.

Q. Did you—did the records for the same period of time, July 10, 1979 through August 10, 1979?

A. Yes, sir.

Q. Now, did you make up a 703 form as to Ms. Huett in the same manner as you did with the other patients?

A. Yes, sir.

Q. As you went through the records?

A. Yes, sir.

Q. Alright, now Dr. Brinkley, please refer to the degree of incapacity on Government's Exhibit 11? What

does that document reflect with respect to the bedridden status of the patient, Sreathie Huett?

A. Bedfast, sits on the side of the bed, sits up in chair part time.

Q. Alright, did you find that to be the case based on your review of the records?

A. No, sir.

Q. Alright, what did it reflect with respect to the category ambulation, I am talking about Government's Exhibit 11 now?

A. Walks with walker.

Q. What did you find to be the case with respect to the patient's ability to walk?

A. Walks alone.

Q. Alright, now on Government's Exhibit 11, what does tht form reflect with respect to the amount of assistance or care that Mrs. Huett needed for her personal grooming?

A. She needed total care, total help with tub bath, bed bath, shower bath, dressing, and care of hair on Exhibit 11.

Q. Now what was the cut off date on the review of your medical records?

A. August 10th.

Q. Of 1979?

A. Of 1979.

Q. What does Government—well let me back up—what did you find to be the case during those particular months with respect to the amount of care or assistance that Mrs. Huett needed on her personal grooming?

A. I found that she needed no help with her personal grooming.

Q. During that period of time?

A. During that period of time, yes.

Q. Now could she have needed help later on?

A. Yes, sir. She became ill on August the 15th and she was transferred to the hospital. For shortness of breath and chest pain.

Q. Did her condition after August 15, 1979, had deteriorated?

A. Well, if we go back to the nurses notes, it shows that she came back August 15th and is reported to be up and to the dining room for meals and needed some assistance with tub bath, but would walk for exercise, so she got better, apparently.

Q. Now, let me ask you this, with respect to continent status on Government's Exhibit 11, what is checked?

A. Partially.

Q. Did you find that to be the case on your review of the medical records?

A. No.

Q. Alright, on Government's Exhibit 11, what is shown with respect to the patient's mental status?

A. Markedly confused, needs supervisor for personal safety and hyperactive.

Q. On Govermnent's Exhibit 11, do we have another case where the patient is shown to be both bedfast and hyperactive?

A. Yes.

Q. Alright, what did you find based on your review of the medical records with respect to the mental status of Sreathie Huett from July 10, 1979 through August 10, 1979?

A. Clear.

Q. Clear? Alright, what about her ability to feed herself. What does Government's Exhibit 11 say?

A. Some help needed.

Q. During that period of time?

A. Yes.

Q. And now what did you find based upon your review of the records?

A. That she could feed herself.

Q. Now, based upon your familiarity to the standards governing the classification of medicaid patients in Arkansas nursing homes, during the calendar year 1979, your review of the medical records, nurses notes and daily log entries pertaining to the patient, Sreathie Huett, that were kept at the Cumberland Lodge Nursing Home from July 10, 1979 through August 10, 1979, do you have an opinon as to the accuracy of the information set out on that portion of Government's Exhibit 11, captioned degree of incapacity?

A. I think it is inaccurate.

Q. Your Honor, at this time I would move for the admission of Government's Exhibit 22.

THE COURT: Alright, let it be received.

(Thereupon Government's Exhibit No. 22 was received in evidence)

BY MR. GOVAR:

Q. Dr. Brinkley, do you know who Sreathie Huett is?

A. No sir.

Q. Do you know who she is related to any nursing home operators that you may know?

A. No sir.

Q. Do you know many nursing home operators?

A. I know a few around the state.

Q. Okay, let me ask you this, now for fourteen years you classified medicaid patients in nursing homes, is that right?

A. Yes, sir.

Q. Now, let me give you a hypothetical situation, I am a nursing home operator and you have classified one of my patients, John Doe, as a class "C" patient. Or a minimum care patient, I don't like your classification, why wouldn't I like it in the first place?

A. If you thought it wasn't correct, you wouldn't like it.

MR. LESSENBERRY: Your Honor, I think this is calling for the witness to speculate about the state of mind of the United States Attorney and I don't think that is very fair to either one of them.

MR. GOVAR: I think Mr. Lessenberry is right, because it assumes that I have a mind to start with. So I will withdraw it and start over. I think what I am trying to get at is this.

BY MR. GOVAR:

Q. I am a nursing home operator and I don't like the way you classified one of my patients, do I have any recourse?

A. There is an appeal procedure that the nursing homes can go into for the appeal of their classifications.

Q. Alright, would you explain that procedure and how it operates to the ladies and gentlemen of the jury?

A. Well, I can just partially explain it because I ugh—my contact with the appeal procedure was—if the first classification was appealed then it was the 703 was sent back through the same channels, and it came back through me with whatever new information might have been added or wished to be conveyed and another look was taken at the record and ugh—I occasionally make mistakes of judgment, clerical mistakes, checked the wrong box, ugh—being human I made the human mistakes which was the first appeal procedure. And I did those, at the had another physician helping with the classification, he did not do the appeals, I did all the appeals.

Q. Did you do all the appeals of classifications of nursing home patients during the year 1979?

A. I believe I did, yes sir. Now, whatever the classification came out with that first appeal, when it went

back to the home, and if they were not happy with it for whatever reason, then there was another procedure that they would follow and it did not come back through me. It went through another appeal group with another physician who had never seen the 703 in the first place and knew nothing about it, so that the appeal, the second appeal went back through them and I never say it, the case again until later when it came up for another routine classification.

Q. Would any additional information be submitted by the nursing home in an appeal situation where they were appealing a classification of a patient?

A. As a general rule, the nursing home would submit another 703, not always but in some instances the operators would suggest that I had just grossly made an error in my judgment and sometimes I had.

Q. When you say—

A. But lots of the times, and in those instances they maybe wouldn't even submit a new 703 and in other instances, they would submit a new 703 on the first appeal to come back along with the original 703.

Q. Okay, besides just another 703 or a new 703, would you have any additional information at your disposal for the purpose of deciding the appeal of the classification?

A. I would have the original 703 and then the new 703, but I wouldn't have much new information at my disposal for the first appeal.

Q. Okay, now would the nursing home ever be required to submit all its nursing notes and stuff, to accord an appeal of the classification?

A. Yes, they were especially on the second appeal. They would have to come forth with supporting

information, and that sort of stuff. But I wouldn't be in on that appeal procedure at all.

Q. Alright, now let's get our terminology straight here. If a nursing home operator who thinks they have a patient who has had a change in condition sufficient to warrant a new or up graded classification, now if I under the procedure, and correct me if I am wrong, that nursing home submits a 703 form, right requesting a reclassification of the patient?

A. Yes.

Q. Is that concerned the first appeal?

A. That is the first appeal.

Q. Okay, now, if that request to reclassify that patient is denied, or if they don't get the category the "B" or "A" or whatever they are trying to get, if they don't get that, then they can appeal again, is that right?

A. That's correct.

Q. And that is what you are referring to the second appeal?

A. That's, that is what I am referring to as the second appeal, and I believe that is the procedure.

Q. And now as I understand your testimony, and again correct me, if I am wrong, on this second appeal, you were the only physician that decided those matters, is that right?

A. No, on the first appeal—

Q. On the first appeal—

A. On the first appeal, it came back to me. Oh, if it came back for a second appeal, I didn't see any of that.

Q. Your Honor, I would like to have this marked as Government's Composite Exhibit 22—23, I am sorry, 23?

THE COURT: Alright, Mr. Lessenberry?

MR. LESSENBERRY: May we approach the bench?

(Recess)

(Objection to questioning regarding the administrative appeals is overruled)

BY MR. GOVAR:

Q. Dr. Brinkley, before the noon recess I was asking you some question about a nursing home's right or process of appeal in a medicaid patient's classification, do you recall those questions?

A. Yes, sir.

Q. Alright, do you know how a nursing home is informed of a decision when a patient classification has been appealed?

A. No, sir.

Q. You don't know the specific procedure?

A. I don't, no I don't know the specific of that.

Q. Okay, at this time. Dr. Brinkley, I would like to hand you what has been marked as Government's Exhibit 23. Now, do you recognize that document?

A. That's a document that when I classify a case, I mark my classification either skilled, intermediate or minimum and sign it.

Q. Alright, do you recognize your signature anywhere on that document?

A. Yes sir, my signature is there—the medical reviewer.

Q. Alright, you were the medical reviewer, that is where you signed?

A. Yes, sir.

Q. Is this form referred to by a number like these other forms, SS704?

A. Yes sir, and at the top up here it has appeal "x" by it.

Q. What does that indicate?

A. I would presume this was an appeal procedure that I did on this particular individual.

Q. Okay, so if this -

THE COURT: Just a second, we have an objection.

MR. LESSENBERRY: Yes, I want to object to the testimony consistent with the objection that I made earlier, Your Honor, regarding reference to these two documents.

THE COURT: What is your reponse, Mr. Govar?

MR. GOVAR: The same as it was before Your Honor.

THE COURT: The objection will be overruled, however, Mr. Govar, we discussed the limited nature—

MR. GOVAR: Yes sir.

THE COURT: Of this document, so stick within the boundaries of this understanding.

MR. GOVAR: Yes sir.

BY MR. GOVAR:

Q. Dr. Brinkley, what patient does this document marked as Government's Exhibit 23 refer to?

A. Mary Welch.

Q. Alright and what does the top of the form indicate that this document relates to?

A. Appeal.

Q. Alright and what level of care does the document indicate that Mary Welch is entitled to?

A. Minimum.

Q. And what is the date of your decision of this appeal?

A. 7/19/79.

Q. 7/19/79?

A. Yes.

Q. That is July 19, 1979?

A. Yes.

Q. Is this a form or a record that was ordinarily kept in the business as a medical reviewer in the office of Long Term Care?

A. I think it was.

Q. Your Honor, we move the admission of Government's Exhibit 23.

THE COURT: Alright, Mr. Lessenberry?

MR. LESSENBERRY: Same objection Your Honor.

THE COURT: The objection will be overruled. And of course, ladies and gentlemen of the jury, we have a document here that the Government has moved to be admitted in evidence thus, you will have the opportunity of viewing it, but the Court would like to emphasize that it is being admitted into evidence for one purpose and one purpose only, and that goes to the question of intent on the part of the Defendant to defraud the government and for no other purpose. It is being admitted on a limited basis going to the question of intent.

MR. GOVAR: Your Honor, may I pass the exhibit?

THE COURT: You may so pass the exhibit?

BY MR. GOVAR:

Q. Dr. Brinkley, I am handing you what has been previously marked as Government's Exhibit 24, would you look at that document, what is the document?

A. The document is a form 704.

Q. What is the patient's name?

A. William Moore.

Q. William Moore?

A. It is an appeal, its marked minimum, has my signature as the medical reviewer, the date of decision is 7/19/79.

Q. Alright, now that is your signature on the form?

A. Yes sir.

Q. Alright, based on the evidence or what other information that was submitted to that appeal, what level of care did you determine the patient should be classified as?

A. Minimum.

Q. And what was the date of the decision on that appeal?

A. July 19, 1979.

Q. When was the 703, the—in support of that appeal signed?

A. April 1, 1979.

Q. Okay, and what date was the information on the 703 to be reviewed?

A. The date to be reviewed was January 19, 1980.

Q. Your Honor, I move for the admission of Government's Exhibit 24.

THE COURT: Alright, Mr. Lessenberry?

MR. LESSENBERRY: Same objection, if it please the Court.

THE COURT: Alright, the objection will be overruled. Ladies and gentlemen the jury, Government's

Exhibit 24 is also being admitted on a limited basis. admitted for the purpose of intent on the part of the Defendant to defraud the Government and for no other purpose, and you may consider it only in connection with the question of intent.

BY MR. GOVAR:

Q. Dr. Brinkley, would you again refer to Government's Exhibit 9. What is the name of the patient on that Exhibit?

A. William Moore.

Q. What date is that Exhibit signed?

A. 7/31/79.

Q. 7/31/79?

A. Yes, sir.

Q. Would you refer to Government's Exhibit 5? What is the name of that patient?

A. Mary Welch.

Q. And what is the date of the 703 form signed?

A. 7/31/79.

Q. Now, Dr. Brinkley, in the process of classifying medicaid patients in Arkansas nursing homes, did you ever have occasions to review any computer cards in making your classifications?

A. No computer cards.

Q. No computer cards?

A. No, sir.

Q. Did anybody ever submit any computer cards to you for your review or use in classifying medicaid patients?

A. No, we at one time were asked to try to set up a system using computers for classification, but we never really worked on it, never worked it out, never was used. It was a fox somewhere along the line.

Q. But a computer system was never took place, is that it?

A. That is correct.

Q. Okay, were nursing homes ever required to prepare computer cards to your knowledge for use—for the use or your office's use for classifying medicaid patients?

A. I don't know.

Q. You don't know?

A. I don't know.

Q. Dr. Brinkley, I want you to look through defense exhibit 5 through 10 or 3 through 10. Have you ever seen any documents like that before?

A. No, sir.

Q. Have you ever used any such documents in the classification of medicaid patients in Arkansas nursing homes?

A. No, sir.

Q. Have any documents such as that been sent to you to justify the classification of any particular patient in an Arkansas nursing home?

A. No, sir.

Q. Dr. Brinkley, based on your experience and in the classification of medicaid patients in Arkansas nursing homes and your familiarity with the standards governing the classification of such patients, would you agree with the statement that there is no such thing as a minimum care patient in a nursing home?

A. No, sir.

Q. You would not agree with that?

A. No, sir.

Q. Now, you have had an opportunity to review at some length prior—previously to the lunch recess Government's Exhibits 2 through 11, the ones with the yellow tags pertaining to the patients we have gone over. Based on your review of the medical records pertaining to all of these patients for the periods you have mentioned, were any of these ten patients legitimate "B" class patients, or intermediate patients at the time the 703s were dated? To save you some time, I will tell you that they were all dated July 31, 1979 except one that was dated August 1, 1979.

A. These—all of these 703s had been classified as intermediate, but going through the nurses notes and the records pertaining to these as we did this morning were I made—went in and made my determination and did my own 703s and I determined that all of them should have been at this stage should have been minimum care.

Q. Alright, now did—during the course of your going through these records, did you note any change of condition in any of the patients that would justify attempting to raise the classification from a "C" to a "B" as of the date that those 703 forms are signed?

A. Can I have a minute to go through them—my dictation here?

Q. Yes, sir?

A. I—

Q. Maybe if I rephrase my question, it would make it easier. You previously testified that you reviewed these records, these medical records from July 10, 1979 through August 10, 1979. Did you note anything in your review of those records as to any of the patients that would justify raising the patient from a "C" patient to a "B" patient?

A. No, sir.

Q. Based on your experience classifying medicaid patients in Arkansas nursing homes, and based on your familiarity with the standards and criteria utilized by the State of Arkansas during 1979 to classify medicaid patients in nursing homes, do you have an opinion as to whether the inaccurate or incorrect information on the 703s marked as Government's Exhibit 2 through 11, would cause these patients to be classified higher than they should have been?

A. Well, the way these 703s are written would cause them to be classified higher than they should have been.

Q. Alright, yes sir, at that time. Are you familiar with the procedure with respect as to how 703s are initially screened at the Office of Long Term Services?

A. I don't know that I know the specific routing and procedures as they come in, no sir.

Q. Are you familiar with a procedure with a piece of cardboard or something similar with holes in it that are used to review these 703s?

A. No, sir.

Q. You are not familiar with that?

A. I am not familiar with that, no sir.

Q. Dr. Brinkley, would you consider a lady who could jog as requiring any entry on the 703 under the classification or the section bedridden?

A. No, sir.

Q. Pass the witness.

CROSS EXAMINATION
BY MR. LESSENBERRY:

Q. Doctor, first I want to be sure that I had a thorough understanding of what I believe you just told the ladies and gentlemen here and that is basically the front page is the sole determinator of classification, so far as you are concerned?

A. It is the majority.

Q. Yes, and I think, if I am not quoting you the degree of incapacity or the degree of assistance that is really the turnpoint that balances these patients in your opinion?

A. Yes, sir.

Q. Alright, now doctor, ugh—when you were asked from ten years ago or so to prepare this criteria was there a federal criteria that had been enforce?

A. There was at least a state criteria that we were using.

Q. But you undertook to change that?

A. We streamlined it somewhat.

Q. Alright, this criteria that has been introduced and I am not real sure what the exhibit number is, I think it is the Defendant's No. 11, is not and never has been a rule or a regulation has it?

A. I don't—I think it is just a criteria, we use it as a criteria by which we classified. And I don't know what you would call it, but—

Q. And this is the same criteria and so that I don't get in further confused, this is it, that doesn't have a—here it is, yes I am correct, it is Defendant's Exhibit No. 11. And you are the author of that, as I understood your testimony except for that notation down there at the bottom with the asterisk?

A. Yes sir.

Q. Okay, now if you would help me a little bit in may be getting a better understanding of the information that was provided you in reaching the opinion that you had regarding these ten patients? I understood that you had the nursing notes?

A. Yes, sir.

Q. And that was for a fairly limited period of time?

A. It was for July the 10th until August 10, 1979.

Q. Was it your understanding that that's all the nursing notes that were available or was that all you requested?

A. No sir, I had a full chart, I suppose, I had alot more than that in each chart.

Q. But that is what you choose to review in making the determination that you have given here.

A. That was what I was requested to review, yes.

Q. Oh, who asked you to limit that?

A. Mr. Lucas and Mr. Govar.

Q. Oh, I see and in the material that was furnished to you was it exclusively the nurses notes?

A. I don't think so. No, I think—

Q. Was the doctor's order for instances?

A. I believe so.

Q. Was there medications?

A. I think so.

Q. Was there a plan of care?

A. This—the plan of care, I don't remember.

Q. How about hospitalization, records of that that was there?

A. No hospitalization records.

Q. Okay, would any of those things have been available to you or do you know if they would have?

A. I presume they would have, I don't know if they were or not but I presume they would have been.

Q. Now the—in reaching your opinion that you have just given to us, you did not rely on any list of medications that were provided as I understand it?

A. That's right.

Q. And you didn't rely upon any doctor's orders or things of this nature that the patient's doctor had discovered or felt important enough to make a record of that?

A. Well, ugh—I looked at the—made note of it in my mind but it was not the primary determinate.

Q. Alright, now if I may ask you to move from that train of thought that we have kind of established there, are you suggesting to these ladies and gentlemen that at some time in 1979, that the patient's doctor's were not sending to Long Term Social Services or Social Services Long Term Care a card or a written instrument suggesting the level of care and the need for that patient to have nursing home services?

A. I am not suggesting it because I don't know—

Q. You are just not aware of it?

A. I am not aware of it, yes sir.

Q. Were you aware that—or was there in any of the files that were provided to you any kind instrument similar to Defenant's number 6, 7 and so on? Was that in that material that was given to you?

A. I don't think it was.

Q. Alright, now doctor, I want you to pick up Exhibit No. 10, if you would please sir,—

A. For the Defense or the Government?

Q. Yes for the defense.

A. Okay.

Q. Your Honor with permission of the Court and counsel for the Government, I have taken the liberty to make some copies of Defendant's Exhibit No. 10 in the clerk's office and at this time I would like to hand the Court one, and counsel and the ladies and gentlemen of the jury.

THE COURT: I think I already have a copy which was attached to your Motion.

MR. LESSENBERRY: Alright. Let me give you one here to doctor.

THE COURT: I gather you have no objections to this Mr. Govar?

MR. GOVAR: Oh no, Your Honor.

THE COURT: Alright. Let it be done.

MR. LESSENBERRY: Well, I don't have one now.

THE COURT: Would you like to use the Court's copy?

MR. LESSENBERRY: No, Your Honor, I do have one that I have marked on it.

BY MR. LESSENBERRY:

Q. Now doctor, the first thing that I want to ask you about is—bring your attention to the criteria for minimum care patients and if you would I think it is on the fourth line beginning sentence assistance—would you read that to these ladies and gentlemen and we can just read along together, if you would out loud though so that the record might be made.

A. Assistance with grooming will vary from no help to total help.

Q. Alright, thank you. Now doctor, with a 703 there is —I don't—excuse me—when was the 703 form created, was it in use when you first came there—when you started doing this work?

A. No, we called it an NH2 and the NH2, I believe was a longer form or more pages and we streamlied it somewhat to conform to a two page form. I don't know the exact time that we did this.

Q. Now when was the 703 adopted in the form that we have seen it here the last few days?

A. That I don't know. I don't know the exact year.

Q. Now, in regard to this—assistance with grooming will vary from no help to total help. Do I understand your language to mean that it doesn't make any difference for a minimum care patient whether they get no help or total help. That's just not decisive?

A. Within itself that it is not a very decisive thing.

Q. So this portion of the 703 here it really doesn't have anything to do with determining the level of care, does it? Because we could all get total help and still fall in this minimum area?

A. Yes, except that it helps me in my medical judgment to determine what the overall incapacity might be.

Q. I see, well I am just using your language here that it doesn't make any difference it can vary from no help to total help, isn't that right?

A. The—ugh—this says it can vary from no help to total help.

Q. And it is still minimum, doesn't have anything to do with higher classification, does it?

A. That is correct.

Q. So that part of the 703 just really doesn't have any part of this lawsuit, does it, whether somebody felt like they needed total help or no help. We can just get rid of that, can't we? And it is not going to affect your decision based on your criteria at all, so we can just tear that off, can't we?

A. You can tear it off, yes sir.

Q. Okay, now if you would I want you to refer now to your criteria of intermediate and begin to read, I believe it is on the fifth line, the mental status. Read that for me please.

A. The mental status will vary from clear to markedly confused requiring supervisor for personal safety.

Q. Alright, thank you doctor, would you go down to minimum below that and begin to read I believe it is on the fifth line—mental status?

A. Mental status will vary from clear to markedly confused requiring supervisor for personal safety.

Q. Is that the exact same language that applies to that standard that you have in both of those?

A. Yes, sir.

Q. Alright, say I am a patient and my mental status varies from clear to markedly confused requiring a

supervisor for my personal safety. According to your criteria, am I a minimum care or an intermediate care?

A. Just on that alone, I couldn't say.

Q. Well, I am just looking at your criteria doctor that you used in judging these patients here.

A. You are just looking at a part of it.

Q. I see, alright now doctor, I want you to look down here at ugh—just where you finished reading and ugh—excuse me just about that on minimum, beginning the second sentence. They would be able to feed themselves go ahead—

A. They would be able to feed themselves going to the dining room without a great deal of cleaning up afterwards.

Q. Doctor, what if they required a great deal of cleaning up, does that mean that they are an intermediate care?

A. It would be considered, I am sure.

Q. Well, you would be the one that—what did you mean when you put that in there?

A. What did I mean when I up—

Q. Yes, sir—

A. About the cleaning up?

Q. If they required a great deal of cleaning, weren't you saying that if they required a lot of cleaning up that they need more assistance?

A. If they—that would be one of the things that I would consider along with other things. Other—in the criteria for a higher classification.

Q. Alright doc, now on your 703 at the bottom of the page on the lower right hand side, it says needs restraint? Is there any reference in your criteria as to the use of restraints on a patient?

A. I don't think so specifically.

Q. Could you tell me why the 703 needs restraints there unless it just doesn't mean anything?

A. It means something, it tells me more of the mental status of the patient.

Q. But you don't make any reference to it in your criteria, do you?

A. No, sir.

Q. Now, doctor, I want to ask you under the criteria that you have used here, a person could be able to walk alone, and not be continent, be clear mentally all on the front page and would be an irrigation of wounds and administration of oxygen and intermittent positive pressure breathing therapy and you would classify that a person as a "C" patient, wou dn't you?

A. Yes, sir.

Q. Why have you got that kind of treatment up here in skilled care?

A. It goes with the other things that we use to determine.

Q. But doctor, it is not on the front page. Actually aren't the things that relate to a skilled and an intermediate patient all found on the back page virtually?

A. No, sir.

Q. Okay, let's just talk about change of dressings? Where is that on here? While you are looking for that why don't you look for medications would be complex on the first page? Irrigation of wounds, doesn't medications have a great deal to do with the assistance and the staffing of a qualified nursing home? Doesn't that require doctor, a skilled person providing that to the patients?

A. And it is listed up on the criteria under skilled.

Q. Yes, I said where is it on the front page, that is the one that you use?

A. That is not the only page we use.

Q. That is the main page isn't it?

A. We get the majority of your information, yes sir.

Q. Well,—

A. There are two pages to the—

Q. Well, since we got rid of grooming the majority over here is bedridden, ambulation and continence status and mental status. It doesn't say anything in world about medication or supervision, does it?

A. On the front page, no sir.

Q. Doctor, in—you are an internist?

A. Yes, sir.

Q. What a general practitioner calls on your help or assistance, do you think it is important to talk to that doctor about how that patient is doing or what the problems of that patient seems—complaints, ugh--what medications has been tried, things of this nature?

A. That is good information, yes sir.

Q. What about the nurses, if there has been a hospitalization or a person in a nursing home, certainly it is worth the trip going by and talking with the people that are seeing that patient on a fairly regular and routine basis, isn't it?

A. Or reading what they say about it.

Q. From the chart?

A. Yes sir.

Q. Yes, in your experience with nursing homes, the charts aren't always totally complete, there are not things there that ugh—you learn that are involved with the patient that are not shown on the chart. You found that out many times, haven't you?

A. I have found that out, yes sir.

Q. Did it ever occur to you, doctor, in this case before reaching the conclusion that you have before these ladies and gentlemen that you would like to talk to some of those nurses?

A. No, sir.

Q. It wouldn't make any difference what kind of contribution that they could make or tell you about some of these patients, would it?

A. With the information that I have on the chart, I didn't feel that it was necessary, yes—no sir.

Q. Front page, I think that is what—I didn't hear you on your direct examination mention the back page at all except feeding, am I wrong?

A. I don't know.

Q. Would it have been important or do you think that it would have been significant for you to have talked with the doctor, who were prescribing medication, who were seeing people who had diabetes or something of this nature?

A. In the—in the case of these—

Q. Of those ten?

A. Of those ten? I don't think that would have had a whole lot of relevancy with what I was doing, no sir.

Q. You are basically again dealing with the front page, weren't you? That is ambulation, bedridden and what? Would it have been important for you doctor in determining what kind of level of care these patients should have had or might have had or were entitled to have it findout what had happened to them at a hospital? When they came in there, how they were doing?

A. Would it have been important to—

Q. Yes.

A. It was there. In most of the charts, I had the information of that sort.

Q. Did it have anything to do with bedridden or ambulation or those things, did it?

A. Not from your hospital records.

Q. It had things to do like congestive heart failure or pneumonia?

A. It was—

Q. That is what those records were about?

A. It would have been in the past, yes sir.

Q. Now, doctor, is the work that you had done for Social Services and specifically I want to talk about August of 1979 or even the early part of '80. Looking at these 703s was sort of a side line with you wasn't it?

A. It was something that I was asked to do, yes sir.

Q. I understand, it was a kind of a sideline with you?

A. No sir, it wasn't a sideline, I was asked to do it and I did it to the best of my abililty.

Q. Did you go to Long Term Social Services where they have a lot of these records to do your work or did you take them home with you?

A. I took these home with me.

Q. Did you compare or consult with any other physician about these people here at all?

A. No, sir.

Q. Now doctor, are you aware of the—I think, it was the Utilization Review Team or Inspection Team that I believe annually goes to the various nursing homes and checks out the patients?

A. I know that they do exist.

Q. Alright, well specifically have you ever met a lady named Uthel Stegall?

A. Not that I remember.

Q. You don't remember Mrs. Stegall?

A. No, sir.

Q. Richard Vestal, do you know him?

A. Not that I remember.

Q. Did you know that a review had been made of all of the patients at Cumberland sometime in early or mid-September of 1979?

A. No, sir.

Q. Would it have been important to your doctor, or would you have liked to have had the opportunity of talking with those people from Social Services that went out there and looked at those patients?

A. Not—not in the context that I was doing.

Q. Doctor, when was the job that you have told us about that you were performing, when was that terminated?

A. With Social Services?

Q. Yes?

A. In June of 1980. 1981.

Q. After June of 1981, did you continue to sign any 704s or any other instruments relating to a review of patients?

A. No, sir.

Q. Did you ever sign any of those blank forms doctor?

A. No, sir.

Q. I think, doctor, I want to hand you Defendant's Exhibit 13 that has been marked for identification and ask you if you recognize that document?

MR. GOVAR: Your Honor, I have an objection to make to the admission of this document. It relates to the standards, as I understand exist now. And no relevancy to the dates of the indictment.

THE COURT: What about that Mr. Lessenberry?

MR. LESSENBERRY: That is true, Your Honor, I am offering this and I am going to ask the doctor about his participation in this and then I intend to offer evidence during the defense's case as to the reasons why the new criterias were adopted.

THE COURT: And those standards were adopted after this indictment?

MR. LESSENBERRY: Yes sir.

MR. GOVAR: Your Honor—

MR. LESSENBERRY: Even after this indictment.

THE COURT: Beg your pardon?

MR. GOVAR: I would like a specification of the year when these particular standards were adopted?

MR. LESSENBERRY: The ones that have been offered?

MR. GOVAR: That one right there.

MR. LESSENBERRY: Yes. I got it from his office.

MR. GOVAR: Well, it didn't have anything to do with the trial, if it is anything after 1979.

THE COURT: Mr. Lessenberry, what about that. He is questioning the relevancy of this document.

MR. LESSENBERRY: Well Your Honor, it is going to show and I think this is the very heart of the case that the new criteria that has been prepared was made in order to substitute and take the place of the old ones because the vagueness and the inconsistencies of the old one.

THE COURT: Alright, the Court is going to sustain the objection on the grounds of relevancy and as much as you admit that these standards were adopted either after the indictment was filed or after the incident involving these various questions.

MR. LESSENBERRY: Yes Your Honor, thank you very much, I would like an opportunity out of the hearing of the jury to go ahead and—

THE COURT: And make a record.

MR. LESSENBERRY: Yes.

THE COURT: Mr. Govar, sure.

MR. GOVAR: Your Honor, may the jury be admonished to disregard counsel's statement concerning the—

THE COURT: Yes, alright, ladies and gentlemen of the jury, the Court has sustained the Government's objection to this proffered or document that was tendered for this witness' consideration and then ultimately for your consideration and as I cautioned you the very first day

when I gave you the preliminary instruction that lawyers have a duty to object and if the Court's sustains an objection, it means that you do not consider that evidence for what is sustained a Motion to Strike an exhibit that you will not consider the exhibit. It so happens that this is what the Coiurt was talking about. The Court has sustained the Government's objection to this document, you will not be afforded the opportunity to consider it and I ask you to disregard any statements that were made by Mr. Lessenberry in connection with the tendered document. Alright, now you want to make a proffered for the record, now or later?

MR. LESSENBERRY: I can do it later Your Honor. Well, excuse me, can we approach the bench?

THE COURT: Yes.

(ALL AT BENCH CONFERENCE)

BY MR. LESSENBERRY:

Q. Are you a member of the Utilization Review Team now or participant now in reviewing?

A. Yes, sir.

Q. Has that procedure been changed in the last year or so?

A. Which procedure?

Q. The reviewing? Now you review as a group at Social Services, do you not?

A. We review as a group at Social Services, yes sir.

Q. You didn't do that back at the time?

A. No, sir.

Q. And with you at this time is another doctor and I believe somebody else?

A. There are two—we have a committee of two other doctors and a nurse and other nurses who make recommendations.

Q. Did you ever in reviewing the material that you have told us about here ask anyone to provide you with any additional information concerning any of these patients?

A. No, sir.

Q. Now, I want to ask you doctor, the staffing patterns of a nursing home at this time and even back in 1979 were determined by the number of patients intermediate or minimum or skilled, is that correct or do you know that?

A. I don't know that the technicalities of that.

Q. As a doctor, the nursing home has to prepared to take care of the patient at the patient's worse time, don't they, so as to provide the service?

A. Yes sir, I would expect that.

Q. Now in reviewing the 703s that—were they ever introduced? 2 through 11—

MR. GOVAR: As a matter of fact Your Honor, if I may, I move for the admission of Government's Exhibit 1 through 12.

THE COURT: You mean the various 703s?

MR. GOVAR: I don't think that I ever formally

THE COURT: The 703s?

MR. GOVAR: Yes, sir.

THE COURT: According to my notes you moved for the admission of these documents. What about that madam clerk?

THE CLERK: I don't have that they have ever been admitted.

MR. LESSENBERRY: I didn't recall that he had ever done it.

MR. GOVAR: Well, I move for the admission of Government's Exhibit 1 through 12.

THE COURT: Well, I think that it has already been done, but out of an abundance of caution, it is granted.

(Thereupon Government's Exhibits No. 1 through 12 were received in evidence)

BY MR. LESSENBERRY:

Q. You made a reference, doctor, to bedridden in this column that is under bedridden and what did you tell us that bedfast meant to you?

A. Bedfast?

Q. Yes?

A. It is just as the name implies, but you can also be lifted into a wheelchair or a geriatric chair by someone else and put in there just as you would be put in a bed. And still be considered bedfast.

Q. Alright.

A. That is my interruption.

Q. That is your interruption. When you came across a 703 and I believe that you came across ten of them here, there was some reference to bedfast or sitting on the bed with walked with cane, crutch or walker on the same patient.

A. Yes, sir.

Q. Do you remember seeing those—

A. Yes, sir.

Q. Things. The person that was filling that out didn't have obviously, the same sort of definition that you did, did they?

A. Well, that I don't know.

Q. Well, I—going back to the definition that you just provided us, someone is bedfast can get into a wheelchair or geriatric chair with some assistance, is not the same as someone who walks with a cane, crutch or walker?

A. That is correct.

Q. Alright, so I am asking you this question again doctor, a person that filled in ambulation over here with everything but the bottom one certainly didn't have the same conutation of bedfast that you have would be—who ever filled this out or prepared—interpreted it.

A. Well, there is no comparison between walking and being bedfast. If you are trying to say that somehow they could be made to be the same, certainly they couldn't.

Q. No. Did that give some sort of indication to you that the person who is completing this was obviously not aware of the interpretation or the definition given to bedfast that you had.

A. Well, that could be one explanation for it.

Q. We saw it about eight or more times, going through here didn't you.

A. I saw this on several occasions, yes sir.

Q. Now, how did you determine whether or not a patient was continent or incontinent, I heard you remark that maybe somebody was partially incontinent, but I think that most all of them you found that the patients to be continent? How did you determine that doctor?

A. By reading the nurses notes and—

Q. And unless you saw something in there about someone was incontinent, you presumed that they were continent then?

A. Unless they were wetting or deficating, without control, then you would have to assume that they had control of those functions.

Q. I see. So that is the interpretation that if you didn't find something specifically there, you were willing to take the worst interpretation from what you saw?

A. Well, I—I reviewed it as the best interpretation.

Q. Well, what is the—your duty to limit or to judge classify as low as you can conceivably can under the circumstances, is that the way you view your duty here?

A. No, sir. My duty is to do it as honestly as I possibly can.

Q. You felt like then that after reviewing some eight of these that where they were marked and you couldn't find it otherwise that obviously somebody was being dishonest on the other side then?

A. I did not assume that, no sir.

Q. You are not telling us then doctor, that these patients were not indeed incontinent, are you? You are telling us that you didn't find it on the nursing notes.

A. That is correct, sir.

Q. Do you have any idea who filled these things out?

A. On each of the nurses notes, it was signed off by the nurses' initials, so that you could go back and determine that, yes sir.

Q. Poor question on my part, I mean the 703s?

A. I have no idea who filled out the 703s, no sir.

Q. Doctor, you didn't find any evidence in the nurses' notes, unless you mentioned maybe one or two, I am not real sure, that any of these patients were markedly confused, or were indeed hyperactive or needed restraints or anything like that, did you?

A. I think there was some instances where they were confused, and I don't remember exactly which ones, but there were some that had some confusion and had some mental librations, but that was not the whole case.

Q. Okay, I want you to turn over to the 703s that we have been reviewing and the next thing that I heard you mention during your testimony was reference to feeding, is that correct sir?

A. On the back—

Q. Yes the second page?

A. First item on the second page, feeding, yes sir.

Q. Did you have occasions to remark in your direct examination during any of these ten patients make any references to medications or things of this nature?

A. I don't think that I did.

Q. Now, however aren't those medications of the standards of your criteria; to have either a "B" or intermediate or an "A" or skilled care patient?

A. There is some provision for it, yes sir.

Q. Yes, but you didn't think it was important for you there?

A. This in going through the nurses notes, this was all assumed, yes sir.

Q. Or you would see that in the nurses' notes?

A. In—in.

Q. I thought you would see it on the medication—

A. On the treatment sheet, I had treatment sheets and nurses notes.

Q. So if they were there, they were just unremarkable basically is what you—

A. Yes, sir.

Q. Telling me. Assessment of social needs or prognosis or any of those things, did you find that—remarkable one way or the other on these ten patients?

A. Not very remarkable, sir.

Q. Now doctor, the appeal procedure that you have told us about, takes how many weeks sir?

A. That I don't know.

Q. You don't get paid during that time do you? The vendor or the nursing home doesn't?

A. I don't know that.

Q. Are you aware of the provision of the law that permits in the event that there has been an over-classification for Social Services to dock or reduce the amount of money that a nursing home receives?

A. I am not aware—I don't know about that, no sir.

Q. Are you aware of the medicaid fraud act that provides for a double the amount penalty?

A. No sir, I don't know of those things.

MR. GOVAR: Your Honor, I am going to object to any legal questions, Dr. Brinkley is not a lawyer.

THE COURT: Mr. Lessenberry, what is your response?

MR. LESSENBERRY: That is the last question I had on the matter. We have the act and I will present evidence Your Honor, subsequently.

THE COURT: Alright, proceed.

BY MR. LESSENBERRY:

Q. Doctor, I want to ask you if any of the things that you pointed out to these ladies and gentlemen that is grooming, ambulation, this sort of thing reflect on the number of skilled personnel needed in a nursing home facilities in order to meet standardization—or R.M., L.P.N.s, somebody like that?

A. Grooming doesn't require any skilled care. That is not a professional care that is required by grooming. Is this what you want to know?

Q. Yes? Someone being bedfast, doesn't require any particular skill care for that?

A. No sir, that is not what I said, Just—you asked me about grooming.

Q. Well, yes and I—you answered that and I was going to the next question.

A. Okay, but—

Q. Does being bedfast require skilled care or is this just general housekeeping—

A. Yes—

Q. Type thing?

A. Being bedfast can certainly require a lot of skilled care.

Q. I see. Walks with a cane, crutch or walker or assisting someone doesn't require alot of skilled care?

A. No, sir.

Q. And continency, does that require skilled care, that is without the use of a catheter?

A. Just occasion incontinent does not require any skilled care.

Q. Alright, doctor, I'm going to ask you to go through you don't have the nurses note now did you?

A. No, sir.

(Recess)

BY MR. LESSENBERRY:

Q. Dr. Brinkley, refer if you would, to Government Exhibit No. 2, which relates to Grayce Murray. Did, I am sorry. I am going to be taking those in numerical order of the exhibits. Doctor let me first ask you to, you have told us that the area of your review was sometime in early July to sometime early in August of 1979. In determining classification or submitting a 703, do you—are you aware of any regulation that says that you are supposed to use a thirty day period or can you use a sixty day period or is there any criteria about the length of time that someone can look at a patient?

A. Ugh—the review ugh—the review interval is set up by regulation. I am not aware of—it is a different number of days for different classifications. And I am not aware of the exact times but there are different times for different.

Q. Okay, I think I did a poor job of asking the question. I understand that for different classifications it provides for an automatic review within a specific period of time.

A. That is correct.

Q. But what I am asking you, is that you used a thirty dayperiod of time as the outer limits of looking at the nursing notes, as I understood what you told us,?

A. I was asked to do that, yes sir. In this instance, yes sir.

Q. Alright, you don't know of any regulation that would prohibit a nursing home from using a sixty day period or having a longer experience with a patient in supporting information for a higher classification?

A. No, sir.

Q. Now, doctor in relation to Government's Exhibit 2, Grayce Murray, did you find any evidence in the nursing notes of any restraints being used on this patient?

A. Do you have a nurses' notes here?

Q. They are here. The notation in your work—

A. There are some nurses' notes here in these—in these copies.

Q. Margaret did you find some? Or do you recall—

A. Here are some nurses notes and I will just have to look at them to answer your question—

Q. Alright,—

A. Unless you have an instance, you can help me?

Q. Okay, ugh—all I can tell you doctor the date underneath the 7/9/79 is the entry above that by Betty Johnson.

A. There is on that first page, on the first line it says restraints released.

Q. Yes.

A. Walked to nurses' station, sat in chair?

Q. Yes, sir.

A. I see that.

Q. Is it necessary in—when a patient is restrained to release those restraints every twenty minutes or so?

A. I think that would just depend on the situation as to how often you would release the restraints.

Q. Did you see at the bottom of that page, on the third line from the bottom of the word confused?

A. Yes, sir.

Q. Over here did you find her in a fight with some of the other patients?

A. Where is that?

Q. Well, let's just go to the next page on 714 and I am going to answer your question. Resisted restraints, 714—

A. I see that, yes sir.

Q. You noted that when you were going through these notes?

A. Patient ambulatory, resisted restraints?

Q. Yes, sir?

A. Yes, sir.

Q. And then the next entry that was 7-3 and the next is 3-11 restrained with sheet.

A. Ugh—in wheelchair for safety?

Q. Yes? And then helped to bed?

A. And helped to bed, yes sir.

Q. Ugh—did you the next page, 717—ugh—confused—

A. Confused, but self care?

Q. Yes, 716 very confused above that?

A. Seems very confused, yes.

Q. Ugh—718, patient decided to take a walk away from home?

A. Yes.

Q. Now, doctor, doesn't that kind of patient require more supervision that just a minimum care patient?

A. Security is felt comes with the rent.

Q. I—

A. Security of your patient comes with the basis rent and it is our way of interpreting those things not to mean extra care is required. That is a basic care.

Q. Alright, but I want to ask you again, someone who is mentally confused, ugh—walks away from the hospital is going to require more supervision than someone that isn't?

A. Certainly.

Q. Do you see on the next page, I think, a reference to being confused?

A. Where on the next page?

Q. Well, ugh—7—I just saw it—at the bottom of 7—the three shift on 722 and ugh—then on the 7-3 shift on 721 ugh—patient is very confused. Must be—what—can you read that?

A. Rough?

Q. On—

A. On the 7-3 of 722, that says very confused right, meals served, right—okay—

Q. Must be watched. Security reasons? These are all things that you looked at, is that correct doctor?

A. Yes sir.

Q. And you felt like that—do—you say that this lady was very confused from the notes of just a few that we have gone through here over a period of a week or so?

A. There was specific instances where she was confused, yes sir.

Q. If I have read your criteria correctly, completely confused or hyperactive is in the skilled care category, isn't it?

A. Completely withdrawn, completely confused or hyperactive.

Q. Yes sir? Would you say this lady was hyperactive being restrained and being confused and taking walks?

A. That wouldn't—that would not be my definition of hyperactivity.

Q. Alright in preparing this criteria doctor, did you provide any definitions as to hyperactivity or not messing up alot at the dining room table and things of this nature, did you give any greater details about what you were specifically interested in when you prepared this?

A. Only what—only what we have on the sheet here, on the criteria.

Q. Did you find when you went through here that Grayce Murray had to—had to go and get her from time to time because she would walk off and that sort of thing?

A. Yes, sir.

Q. Did you find that she was being assisted with various things?

A. Specifically?

Q. Oh, her grooming such as that?

A. I see on the 11—the 25th on 73, bath was given with assistance. And was assisted with sponge bath and oral hygiene.

Q. Okay, what was this patient's diagnosis? It should be on the front of that 703.

A. ASHD, arthritis and generalized arteriosclerosis.

Q. What are ASHD state for?

A. Arterio, scleroid heart disease.

Q. Did you see any evidence here that Ms. Murray was incontinent in urine?

A. Is there a specific area—

Q. Did you see any?

A. I will have to revert—refer to my notes. In my notes I find that she is not incontinent needs only partial help with some things.

Q. So you didn't see any evidence of incontinency of urine?

A. No, sir.

Q. Not even partially there?

A. I didn't note it.

Q. Alright. Doctor, you asked me a question earlier about the fighting. Look at 815, 816, 817, I believe.

A. Okay, 815, and 816—

Q. Do you see those?

A. I see 815—

Q. Doctor on the 703 we can look at that, did you notice the medication that she was taking?

A. Yes, sir.

Q. And what medication is this?

A. Surax.

Q. What is that for?

A. Tranquilizer.

Q. Alright, what else?

A. Dilantin.

A. It is anticonvulsive. Sciolphasmal. Which is a basil-violator, a laxative, milantia, phyozend, which is a tranquilizer, misdrel, which is a tranquilizer, aspirin and myobanmate which is a tranquilizer.

Q. Most of those medications require an L.P.M. or an R.M. to give?

A. People take these at home by themselves.

Q. I am sorry doctor, we are not at home, we are at the nursing home.

A. Well, in response to your question, they do not require someone to give this medication and they can be taken by themselves.

Q. Oh, so that like of medication is not provided or there is not a regulation that requires a nurse to take care of that for that patient?

A. In a nursing—

Q. They can have that over there on their bedside stay and take it whenever they want to?

A. If they were at home, they would do that.

Q. No doctor, we are talking about Cumberland in this particular time phrase or even today—

A. Right. But in a nursing home, it has to be administrated, yes.

Q. Skilled personnel?

A. I don't know about that.

Q. Alright, now you didn't think that you found anything in there that could possibly support an intermediate or "B" classification for this lady, Grayce Murray?

A. No, sir.

Q. I want to ask you one other question before we leave her and that is often times doctor, a nursing home is required to spend more time for someone who is mentally ill than someone who has some sort of physical inferiority and just lays in bed? Is that correct?

A. Yes, sir.

Q. Doctor, if you would turn to Exhibit Number 3, I think that refers to Thomas Cassidy and can I remove some of those things out of your way. I will just put them right here?

A. Thank you.

Q. Yes, sir. Doctor, first have you found his diagnosis? Thomas Cassidy?

A. Yes, sir. The diagnosis on the 703 is schizophrenic paranoid and chronic emphysema.

Q. Let's talk about the schizophrenia. When it is paranoid type does that indicate to the person making that diagnosis of the possible impendency of this patient to violence or at least bizarre behavior?

A. Yes, sir.

Q. And emphysema is what, a disease of the lungs?

A. Of the respiratory system, yes sir.

Q. Have you ever been in a nursing home, doctor, where patients smoke cigarettes?

A. Yes, sir.

Q. And that sort of thing. Does it require some extra people to watch that patient, to watch that cigarette with fire prevention?

A. To a certain—yes, sir.

Q. Did you have an opportunity to look at the physician's notes on Thomas Cassidy?

A. I don't, I don't have a copy of those.

Q. Alright—

A. Well, wait a minute, physician's notes?

Q. Yes, sir. —Orders

A. Orders? Let me look and see. I do not have the physician's orders, no sir.

Q. Do you see the medications that are ordered for Mr. Cassidy there?

A. Starting with 8/5—

Q. Yes, sir?

A. Yes, sir.

Q. Are those medications the same as on the second page of the 703? Specifically in their volume there?

A. Well, there is hylon, phygene, there is valium,—

Q. Are any of those doctor, if I have interrupted you, I apologize, any of those require injections, that is taking it other than by orally?

A. The way the orders are written, he has ordered the 25 millgram phygene i.m., which would be by injection.

Q. Doctor, let's look on your criteria and ugh—I believe it is in the skilled that you put that, I don't see it—medications would be complex. Is that—oh, excuse me Doctor, under intermediate the last sentence, would you read sir?

A. The medi—the medications would involve more injectable medications being needed and some of the more complicated medications would require more skilled observation.

Q. Isn't that true here from what you have seen of the doctor's orders and from the 703?

A. I don't think so, no sir.

Q. Doctor, be honest with you, did you ever look at the second page of the 703 in this particular case or did you just pay attention to the grooming and ambulation and bedridden?

A. Oh, I looked at the second page.

Q. Alright, when you put injectable medications in intermediate, what—if you didn't mean what we have got here, what did you mean doctor to have - a nurse has to give it, doesn't she?

A. A nurse has to give it, yes sir.

Q. And that is not one of these kind that goes around and cleans up or gives a tub bath, is it? That is somebody other than housekeeping?

A. Right.

Q. Okay. Did you see that Thomas Cassidy had some mental problems?

A. Well, they start off with his diagnosis with schizophrenia.

Q. Yes, did you see anything in the nursing notes, doctor, that would indicate that this man might have been markedly confused? I will find it, do you remember even thinking that somebody was passing something through a closed window, do you remember that?

A. I don't remember that.

Q. Okay, I will find it for you. Doctor, look on 8/8/79, that is in the time frame that you were looking at—at these records, weren't you?

A. Yes, sir.

Q. Line 30.

A. 8/8/79—

Q. There is a whole list of things there, what is it about seven or eight lines there, look through there and see if you find the word fantasying. It says something about drugs through the window.

MR. GOVAR: What is the date on that?

MR. LESSENBERRY: 8/8

BY MR. LESSENBERRY:

A. Well, I have got to find 8/8 first. Someone?

Q. Yes, sir.

A. Someone sending drugs through the windows and it is not open?

Q. Yes, sir. Then on down there where sister brings him a pie and he refuses to eat it or he is afraid to?

A. Yes, sir.

Q. Same day or?

A. That is on 8/8, yes sir.

Q. Alright, on the next day, 8/9 hallucinating, 7 til 3? I hope that I have read that right?

A. 9/9 very hallucinating?

Q. Yes. And then above that two lines, isn't that a pretty sick man? You don't think he might make intermediate care?

A. If that is all he is doing, he is not making intermediate care.

Q. Well, alright. Then at 9—8/10, he refused to eat meals. Didn't you say that he didn't need any help with his eating? Doctor, he doesn't need any help to eat when he refused to eat, does he?

A. No, sir.

Q. That is the kind of person you need to look after. Did you notice that he was in bed and had his head covered?

That he refused food for several days? Look over here on 8/11, up in chair refuses to go to dining room.

A. Yes, sir.

Q. You don't think that Mr. Cassidy taking those medications and having—you don't question that diagnosis, do you doctor?

A. No, sir, I am not questioning the diagnosis. No.

Q. You maintain that that is a minimum care patient?

A. Yes sir, I think in the context of the—of all that he is doing, I think he still meets minimum care.

Q. Now that does fall within this category of intermediate that you read to us earlier that is identical to the mental status would vary from clear to markedly confused, requiring supervision?

A. But the mental—but the mental status is all that fits it. The rest of him doesn't fit it.

Q. Oh, wait sir—

A. Right?

Q. Well, I am—

A. You have to take the whole patient and take the patient as a whole one.

Q. Then you are telling us that to be an intermediate patient that ugh—able to work with the help of an attendant or use the wheelchair or that they have to be in bed part of the day, you don't mean that?

A. Is that what it says?

Q. Right? But it doesn't say and, it just has a period. I just thought—or what did you mean when you wrote this up?

A. Our interruption of this was to take it all—all together, not one sentence out of context.

Q. Well, in other words, in order to be intermediate, ugh—a patient would have to fit all of these?

A. Yes, sir.

Q. Everything in these?

A. Yes, sir.

Q. And to be skilled, they would have to meet all of these?

A. Yes, sir.

Q. And so—how many patients have you seen and I am going to begin reading at the fourth line under this classification that there would be irrigation of wounds, changing dresses—dressings, administration of oxygen, intermittent positive pressure breathing therapy, frequent suctioning, physical therapy or prothesistal removal or other therapies. All at one time in one patient. Is that what you are telling us that that is just part of it, he has to be completely helpless and you don't mean that in order to be skilled that each patient has to meet each one of those things, do you?

A. No, sir.

Q. Do you?

A. No, sir, not in that one single line, but he would have to meet the other criteria—the other conditions for being skilled also.

Q. Where do you say that?

A. Like being helpless?

Q. Yes?

A. Okay, patients being helpless—

Q. Oh, helpless and these other things?

A. Needing such services as those provided by—or requiring supervision of skilled nursing personnel or skilled rehabilitation services.

Q. Alright, alright doctor, lets move on to Exhibit Number 4, Glen Morton. What was this patient's diagnosis?

A. Diabetes and hypertension.

Q. Turn to the nurses note on there—you did read that, I am sure, didn't you?

A. The nurses notes?

Q. Yes sir, on the second page?

A. Okay, second page, what date?

Q. 7/31/79. The only 703—well, I am not sure that it is the only one that you have got. Since hospitalization—

A. Oh, wait a minute—

Q. 703—

A. Second page of the 703, okay. Alright. Okay.

Q. Since hospitalization, unable to go to dining room, is this one of them that you found didn't need any help with meals?

A. Did this—was this borne out with the nurses notes?

Q. Well, you and I are disagreeing, doctor, that is what I want to ask you. It says since hospitalization, were you aware that this man had been hospitalized?

A. Okay, let's see. It was obvious that he had been hospitalized sometime,—

Q. Yes.

A. By that statement right there. Okay.

Q. And since that time he had been unable to go to the dining room? Did you read that his diabetes was uncontrolled?

A. Where?

Q. I am talking about the nurses' comments on 703?

A. Oh, on 703?

Q. Yes, sir?

A. Okay, I can read that, yes sir.

Q. Now over to your left sir, the medications right?

A. Right.

Q. He was on a special diet, wasn't he doctor?

A. Diabetic diet, yes sir.

Q. Yes, doesn't that fit within one of these categories here of well, diabetic? But that does enter into the classification that is special diets, doesn't it doctor?

A. Well, under minimum diabetic diet are premissable under minimum care classifications.

Q. Well—I—

A. Yes, sir.

Q. I understand that. And medications, do you see some here where—how do you take insulin?

A. You take insulin by injection.

Q. Well, does that get us back to what we were talking about a little earlier up here in intermediate—injectionable medication being needed?

A. Not to my interpretation, no sir.

Q. Is there any provision, doctor, in minimum care about anything involving injectionable medication?

A. There is nothing specifically stated there, no sir.

Q. It doesn't even give you a hint, does it?

A. No sir, it says nothing specific about it.

Q. The only thing that we find injectionable medications from the criteria that you wrote—authored, is up here in intermediate care, now you are telling us that—that you can still have patients that require injections of insulin, is that on a regular basis?

A. Usually it is every morning.

Q. Yes, and that doesn't come within the intermediate care category?

A. It shouldn't. Unless it is coupled with other factors that would make him intermediate.

Q. Well, what other factors are there?

A. Lack of ability to get around, ugh—lack of control in his body functions,—

Q. Alright—

A. Lack of ability to feed himself.

Q. Stop. Unable to go to dining room. How does that fit? Doctor? Isn't that what you just read us in the nurses comments? Since hospitalization?

A. This is on the 703?

Q. Yes, sir?

A. Okay. Unable to go to dining room, yes sir.

Q. Do you believe that, I mean that is written in there?

A. Why I have no reason to be—

Q. Not?

A. Not to believe it, no sir.

Q. Well, wouldn't that put him there in the intermediate category, doctor?

A. Ugh—you know, they—he could eat in his room.

Q. Well, I thought you said get along and that is what I was talking about, he was not able to go to the dining room, I mentioned that or asked you to read that one when

you said not get along. But how does that food get to his room, doctor? Doesn't somebody have to bring that?

A. It is brought there, yes sir.

Q. But you don't think that would be an intermediate patient, that is Mr. Glen Morton?

A. No, sir.

Q. On the something like this, Mr. Morton had been a "C" or minimum care patient doctor for a period of time, don't the regulations permit the nursing home to apply for a re-evaluation of classification on change of condition?

A. Yes, sir.

Q. Weren't there some noted here—so noted as change of condition in these ten that you looked at?

A. On the top of the—on the top of the 703s, they had change of condition. I failed to find it in the nurses notes and to substantiate that when I went through them.

Q. Yes, when you put change of condition up there, you are kinda waving a flag at somebody that—

A. Yes, sir.

Q. But you couldn't find it.

A. I did not find it, no sir.

Q. Did you think it might have been may be the same reason that you over looked some of these other things that you just told us about? May be that it just got by you?

A. Could have been, yes sir.

Q. Doctor, lets go on to Number 5 and let me say before I ask any questions about—if you have anything to say about one of these patient or contribute something, well feel free to do so as we go through. In looking at exhibit number 5 which pertains to Mary Welch, what was her diagnosis, doctor, if you will first look on that?

A. Acute bronchitis, peptic ulcer disease, pulmonary obstruction disease.

Q. Alright, did you find that she was getting any kind of medications at all?

A. She has medications ordered.

Q. Okay.

A. We are looking on the second page.

Q. Yes, sir. In the criteria again and I am moving here pretty fast, at the end of skilled care, isn't there something there about intermittent positive pressure breathing therapy. What is that?

A. It is—it is done with a breathing apparatus where breathing—positive pressure—positive pressure breathing treatments are given, it has to be given by registered respiratory therapists.

Q. Would that be the kind of thing that might be appropriate for someone that has acute bronchitis?

A. No sir, not necessarily.

Q. Okay, did you find any breathing therapy being used so far as Mary Welch was concerned?

A. She had medications for that ordered.

Q. There are not any of those injectionable medications are there doctor?

A. No sir, they are all oral medications.

Q. Did you see that she was on sort of a special diet there?

A. Regular with ground meat.

Q. Yes, sir.

A. Yes.

Q. Did you see where she required assistance from time to time in moving about?

A. Well I found for the most part she moved about under her own power.

Q. Well, this gets into a problem. Where do you draw the line and—someone that walks without assistance and someone who walks with the help of an attendant, let say?

A. Okay.

Q. If they just get help every week, or does it have to be more frequent than that, just—

A. If I told—to answer you with a question, which I don't like to do, but if I told you that I had to have help in walking, I would imply that I never walk without help. But if I told you that I walked every once in a while somebody had to help me down the hall, this would not meet my of having to have help with walking.

Q. Did you ever have an opportunity to talk with Mabel Huckaby or anybody at Cumberland and discuss with them your interpretation of your criteria with examples like that?

A. I have not, no sir.

Q. When you see on nurses notes that the tray is sent to the room, do you not glean from that and does that not tell you that there is assistance with meals?

A. No sir, it doesn't mean that.

Q. Does it not—

A. Unless it specifically says so.

Q. Does it not imply trouble with ambulation?

A. No, sir.

Q. Well, what does it mean? If anything?

A. Alot of people just prefer to eat in their room and alot of nursing homes would prefer to feed people in their rooms rather than try to herd them all to the dining room. Logistically it is easier to feed them in their rooms.

Q. Did you see anything in the files that were given to you regarding physician orders on Mary Welch?

A. Physician's orders on Mary Welch?

Q. Yes sir?

A. Are we through with Sreathie Huett, is that who we were just—

Q. No, I think we are still on—

A. Are we still on Sreathie Huett?

Q. No, she is number 11, we are on number 5.

A. Mary Welch.

Q. If you don't have it, does that appear to be physician's orders for Mary Welch?

A. Yes, sir.

Q. But—

A. Yes, sir.

Q. Do you know Dr. Riddler?

A. Yes, sir.

Q. He is a practicing medical doctor here in this community for—

A. Yes, sir.

Q. And what does it show there for this patient?

A. This is on February of 1980?

Q. I guess so?

A. He ugh—do you want me to read this—the orders for you?

Q. No particularly, you can generally describe it, however you want to.

A. Literally speaking, he has—

MR. GOVAR: Your Honor. I think I am going to have to interrupt, what does February, 1980 physician's order have to do with anything in this case, the objection is relevancy.

THE COURT: Alright, Mr. Lessenberry what is the relevancy?

MR. LESSENBERRY: Ugh—I didn't even realize that it was February of 1980 when I gave it to the doctor. I will take it back from him at this point.

BY MR. LESSENBERRY:

Q. On the nurses notes that you have Dr. Brinkley, or do you have those?

A. On Mary Welch?

Q. Yes on Mary Welch?

A. Yes.

Q. On 7/18/79, I have one here at the top of the page.

A. Yes, sir.

Q. Who does it indicate that her doctor to be?

A. Riddler, Dr. Riddler.

Q. That same Dr. Riddler that we were talking about a minute ago?

A. Yes, sir.

Q. Okay, what is that first entry there?

A. Remains in bed most of the morning, granulates to the bottom.

Q. Alright, ugh—down ugh—that next day, is she taking tyenol III? 7/19—Doctor, I am sorry if—7 to 3?

A. 7 to 3 on 7/19 ugh—tyenol—out of bed and normally continues to bed with tyenol III.

Q. Is there something about tolerating a diet?

A. Tolerating her diet well.

Q. Doctor, do you see that Mary Welch might have been a candidate for an intermediate classification?

A. No, sir.

Q. Doctor, if you would now go to Government's Exhibit Number 6 involves Catherine Yaniger.

A. Okay.

Q. What was the diagnosis of Mrs. Yaniger?

A. Cateracts in left eye, artheriosclerosis. And—ugh—

Q. Is that senility?

A. Well, I don't know what this is—whether it is hypertension or I can't read what is there.

Q. I understand. On the second page of the 703 was she receiving some medication?

A. She has several medications ordered, yes sir.

Q. Yes sir. ugh—does the nurses' comment indicate that she is getting progressively weaker?

A. It does, yes sir.

Q. Was she on a special diet?

A. Ugh—regular diet with no added salt.

Q. No sodium? What about weight problems? Didn't she need a protein supplement?

A. Well, I don't know that—

Q. Alright. In going—did you have a chance to go through the nurses notes on this lady?

A. Yes, sir.

Q. And did you find that she had shown occasions of confusion, you know remaining in the room and things of this nature?

A. I will have to look and see. I don't have that by memory.

Q. Alright. You did not find that in the nurses notes, that—

A. So far, I have not.

Q. Sure are alot of nurses here, ugh—unrelated to this—did you find any evidence of incontinent on this lady?

A. I don't recall finding incontinence in this lady.

Q. Let go on, if you would to, Johnny Gidron, that is Number 7. And I think you have already described him as a man that had cancer?

A. Yes cancer of the rectum.

Q. And other problems.

A. Arteriosclerosis and post fracture of the hip.

Q. Did you find any evidence of incontinence on his part?

A. My notes ugh—from looking at his nursing notes, I have that I find him to walk alone, have no incontinence and to need no help with tub bath, mental status clear, feeds himself, ambulatory to the dining room.

Q. Did you find that he was receiving any lomotil?

A. Will that be in the nurses notes or do you—se—is it just—

Q. Well—

A. It is ordered, tabs one t i d.

Q. Why does one take lomotil?

A. One takes lomotil for loose stools.

A. I don't know if he was during this time frame here.

Q. Alright, did you see evidence of loose stools in the nurses notes?

A. Not that I recall.

Q. Wouldn't that be some sort of indication of incontinence of the bowels?

A. Well, incontinency has to do with how well you control—you can have loose stools and yet control them in an adequate manner.

Q. 7/12 doctor?

A. 7/12?

Q. Is it 12,—

A. Ugh—7/12 ugh—

Q. Beginning tyenol number III—

A. Tyenol III? Complained of backs in his back.

Q. Doctor, this is the same and has loosen in his bowels and was getting lomotil, right?

A. Right.

Q. He was going out to CARTI everyday, wasn't he?

A. I don't know if he was during this time frame here.

Q. Well, I think we might have some documentation to that. Did—

A. He may well have been, I don't know.

Q. Did you have a chance to see ugh—

A. On 7/17 in the nursing notes, to CARTI via their pickup.

Q. First I want to hand you a document marked for—and ask you if you found that among the material supplied to you regarding this patient?

A. I don't recall reading this, no sir.

Q. Actually it just says—well, what does it say?

A. Where do you want me to start reading?

Q. Well, basically about—

(Objection by government attorney and Mr. Lessenberry withdraws question)

Q. Did you have anything in your file Dr. Brinkley that refers to the illness of Johnny Gidron?

A. In the nurses notes on 7/17/79, it shows that he goes to CARTI by way of their pickup daily.

Q. Do you know any reason by Mr. Govar didn't give you this material with the other that he gave you?

A. I don't know.

Q. Doctor, can you determine—

MR. GOVAR: Your Honor, can I voir dire the ju—the witness on that point?

THE COURT: Alright counsel, what is your response—

MR. LESSENBERRY: Let him.

THE COURT: Request to voir dire?

BY MR. GOVAR:

Q. Dr. Brinkley did I give you any information at any time?

A. You did not Mr. Lucas—just brought the charts, is this is the information I received is the charts.

Q. Alright.

BY MR. LESSENBERRY:

Q. Doctor, I want to get back to Johnny Gidron, now if we may. Ugh—were you able to determine from any of the information that was provided to you that this young man was—not a young man that was going to CARTI?

A. Yes, sir.

Q. Ugh—what is there an indication within the material provided to you as to the kind of treatment that he was getting?

A. At CARTI?

Q. Yes, sir?

A. He would be getting radiation therapy at CARTI. This is the only therapy that they give.

Q. Alright sir. Within the standard of the criteria that you pre—you prepared, would Johnny Gidron fall within the category of being an intermediate or skilled care patient?

A. No, sir.

Q. Did you see in his—in the nursing notes, any references to being withdrawn on occasions?

A. I don't recall them.

Q. Did he have a special diet?

A. He had a high protein diet with snacks.

Q. Was he getting any narcotics for pain?

A. Tyenol III which is a narcotic. An oral tablet.

Q. Doctor, do you know if this patient came from a hospital institution here in Pulaski to Cumberland?

A. I don't know specifically but I think I remember that he did come from one of the local hospitals.

Q. He was—he was in a skilled care facility, if he was in one of licensed hospitals, was he not?

A. A hospital would fit a skilled care, yes sir.

Q. And you say when he hit the door at Cumberland he became minimum care?

A. In this time frame right here, he was minimum care, yes sir.

Q. Do you know where he died?

A. No, sir, I don't.

Q. That is not reflected in the information that was provided to you?

A. It is not in this time frame, yes—no sir.

Q. Thank you doctor, lets go to the next one, number 8. Government's Exhibit 8, Lola Turney. If you would first doctor, look at the diagnosis on the 703?

A. The diagnosis is phlebo thrombosis, cellulitis, hypertension, cardio vascular disease.

Q. Is she a minimum care patient?

A. She is a minimum care patient, yes sir.

Q. Is she taking any kind of medication?

A. She has medication ordered. They are slow K, minnipres, culanmun, tyenol, exidrix, nitrabedpaste, dalmaine, garbaine, tyenol III.

Q. Do you know if she had been hospitalized? Did you determine that from a review of the nurses notes?

A. I don't know when she—I don't know when she had been hospitalized.

Q. But you do have a recollection that she had been?

A. Yes sir, I believe so.

Q. Did you have an occasion to see her physician orders?

A. I do not have them no. Other than the plan of care in the 703.

Q. Oh, yes. Did you—what was her age by the way, do you know?

A. She was 72.

Q. That's correct. Ugh—in just the—lets leave for a moment—did you see the indication that Dr. Betton had indicated that he wanted for these various patient so far as their level of care?

A. I have not seen those documents, no sir.

Q. Well, those were—I think, maybe Mr. Govar had shown them to you under direct examination, they were the ones with the blue—

A. These?

Q. Yes, sir?

A. I see these now, yes sir.

Q. Would they have been—you didn't have those at the time you looked at the nurses charts, did you?

A. No.

Q. Do you know if they may have been a part of the original—might have been a part of the file of the patient?

A. I don't know.

Q. Would it have been important to you to have known level of care requested by the attending physician?

A. Not particularly.

Q. Is it important to you now?

A. Not particularly.

Q. Doctor, what do you base that on—ugh—

A. I have to make the determination based on our criteria and that is what I do.

Q. And this ugh—the attending physician doesn't have anything to do with that?

A. I don't think—I don't necessarily go by his request, of—of what he wants the patient to have.

Q. Doctor, if you are in a nursing home vendor, or you going to try to satisfy and please the medical doctors that come in and the request that they make concerning the patients there?

A. Most of the nursing homes that I have ever been in and have had patients in, do everything they can to satisfy

me as the physician taking care of that patients. And I am sincere in that – they do try.

Q. Did you have any at Cumberland during this time, any private patients?

A. No, sir.

Q. Alright.

A. May I have some water?

THE COURT: Yes.

(Recess)

BY MR. LESSENBERRY:

Q. Doctor, I want to ask you to look at Government's Exhibit 7, that is the patient, Johnny Gidron. In the nurses notes that begin on 8/8 about two-thirds down the page. Have you located that doctor?

A. 8/8?

Q. Yes, sir. Does it indicate there a special diet?

A. Diet, high protein?

Q. Yes, sir?

A. Yes, sir.

Q. Does it indicate an order by the doctor for bed rest?

A. Ugh – I don't have the doctors –

Q. Excuse me on the nurses notes –

A. On the nurses notes, on bed rest—did not go to breakfast area.

Q. Ugh—and then below that there is an indication about refusing to eat?

A. Refused to eat, yes sir.

Q. And then does it indicate a hospital admission?

A. To SVI per stretcher.

Q. Yes, sir.

A. On the 8th.

Q. What is SVI?

A. St. Vincent Infirmary.

Q. What was his blood pressure?

A. On the 8th? There is none on this. Well 8/8 220/120.

Q. Indicating he is shaking real fast?

A. Shake—shakes real fast. Yes.

Q. All indications that patient is a very sick person there?

A. He became very much ill, yes sir.

Q. Alright.

A. And had to go to the hospital.

Q. Let's put that aside, okay? Doctor, I am not going to interrupt what we had been doing but I just hope that I

am going to do it faster. I would ask you to look at Government's Exhibit No. 9, that is William Moore and whatever nurses notes that you have there?

A. Alright sir.

Q. Ugh—first on the 703, could you tell us the diagnosis?

A. Emphysema, seizures and chronic obstructed pulmonary disease, COPD.

Q. Is he an epileptic?

A. He has seizures, yes sir.

Q. Alright. Doctor, do you see anything there about ugh—this patient being in his room receiving medications in these nurses' notes at all?

A. There well may be some there, I—if you will point them out to me—

Q. Well, lets go on, if we find them, it wouldn't make any difference would it doc?

A. Well, just an isolated incident, it wouldn't, no sir.

Q. Then to Number 10, Myrtle Knight, her diagnosis?

A. Her diagnosis is arteriosclerosis, ugh—degenerative joint disease, I believe is DJD, and OBS is organic brain syndrome.

Q. Somebody that has degenerative joint disease, do they have pain when they walk or ambulate?

A. Some—some do.

Q. Was she getting any medication doc?

A. She had some medications ordered, milk magnesia for constipation, ugh—tabrom which I don't know what that is unless it is a vitamin, tigane p.m. for nausea, lomotil p.n. for diarrhea, valium, adavan, twice a day, p.m. and benadril at bedtime for sleep, ugh—and then some supposotories for constipation, and fleet's enimma.

Q. Doctor, even though you may not have found anything in the nurses notes from the medication that she is taking for diarrhea, does that indicate any problems with the bowels or the partial incontinence?

A. Well, the order if necessary for diarrhea, prn means if necessary. It does not mean that she is to receive it all the time. And that is a contingency type of order, that is a covering order that do quite frequently. She may have received some of it, I don't know.

Q. Did she have any kind of chronic brain syndrome?

A. Her diagnosis was organic brain syndrome.

Q. Does a person have a tendency for mental confusion under those circumstances?

A. Well, they certainly can, yes sir.

Q. Does that kind of patient—let's see what were your words, ugh—be markedly confused, withdraw?

A. Or none. It could be the whole game.

Q. Let's move right along doctor, and move to Sreathie Huett. Her diagnosis doctor?

A. Acute bronchistic, peptic ulcer disease, pulmonary obstructive disease.

Q. Congestive heart failure?

A. Not in the diagnosis, no sir.

Q. Well, did she go to the hospital for congestive heart failure?

A. On August 15, 1979, she became short of breath and had tightness in the chest, doctor was notified and patient was sent to St. Vincent Infirmary and admitted to the hospital at that time. But, apparently she didn't have to stay too long, did she?

Q. No, I don't think so. Was she also partially blind?

A. I don't see that on her diagnosis here.

Q. Doctor, in summarizing might reasonable people differ in the classification from one stage to the next? Between minimum and intermediate?

A. I don't understand what you are asking me.

Q. Well, you have given your classification to the jury and I submit to you before you came to us there were other witnesses that have commented about that and I was asking you if there is any gray areas between these classifications or are they shapely delineated?

A. There are gray areas. There are areas of judgment. And they are not sharply demarcated.

Q. A reasonable person could look at some of the same information that you have and perhaps having the benefit of other sources of information and think that perhaps some of these patients might have been skilled care?

A. Well, if they thought that would certainly not have been in agreement with what I think. That wouldn't be reasonable from my way of thinking.

Q. Alright. Ugh—intermediate care that is a little closer—

A. Well, I would still disagree with them. I would still have a variance with them.

Q I understand and from what you have told us, you are able to support your conclusions—

A. Yes—

Q. But one might just as well be as reasonably able to argue that would support a conclusion for intermediate care?

A. No, I don't think so. No, sir.

Q. Doctor, do you base most of your decisions as to the standard or level of care on those front page, as I understood your testimony to be ordinarily—?

A. You get most of your information from the front page.

Q. Is it only when you have confusion about the front page or if it is borderline that you go to the second page?

A. No sir, I look at both pages.

Q. Doctor, since grooming is not part of the criteria why do you—why did you even mark any of these things that you submitted to us earlier?

A. It is just another one of the—conditions that has a bearing on the person as a whole. It—to me—it is reasonable to think that a person who cannot get about, cannot feed himself, cannot control their body functions, also as a usual rule, can't do much of their grooming, can't do the little things that they should be doing under normal

circumstances. It is just another little area that gives you some insight as to what the person as a whole is like.

Q. But even under the very worse circumstances, the need for assistance in those areas will never increase it to intermediate?

A. I don't think so.

Q. Thank you doctor.

A. Yes, sir.

REDIRECT EXAMINATION

BY MR. GOVAR:

Q. Dr. Brinkley, if I come in your office and I am sick, would you decide what course of care to give me based solely upon my temperature?

A. No, sir.

Q. Would you decide what course of care to administer or give me based solely upon my pulse rate?

A. No, sir, if there were other things going on, I wouldn't.

Q. Well, the point I am trying to make, on this 703 form that we have been talking about marked as Government's Exhibits 2 through 11, the information about grooming is not the solely and controlling factor in determining the patient's classification, is it?

A. No.

Q. The information about any section is not the sole and controlling factors about the patient's classification, is it?

A. No.

Q. The information concerning bedridden status is not the controlling factor is it?

A. It weighs fairly heavy but it is not the total thing.

Q. And mental status is not the only thing considered in determining the patient's classification, is it?

A. No, sir.

Q. Or the ability of the patient to either feed themselves or not be able to feed themselves, isn't that correct?

A. Correct.

Q. All these things are considered together in formulating classification for that patient, is it not?

A. Yes, sir.

Q. Now, as a doctor, would you agree that people have from day to day that they health fluctuates from time to time?

A. Yes, sir.

Q. They have good days and bad days?

A. Yes, sir.

Q. Alright. When you are classifying a patient under the Arkansas Medicaid System, in 1979, is it a fair means of classifying the patient if you just pick out this day or that day?

A. No.

Q. You have to look at periods of time, don't you?

A. That is correct.

Q. Now, as I recall we went over the dates on those 703 forms that were submitted by Cumberland Lodge Nursing Home marked as Government's Exhibit 2 through 11. And the dates on those forms, the dates they were signed was July 31, 1979, isn't that right?

A. Yes, sir.

Q. All of them, isn't that right?

A. I think so, yes sir.

MR. LESSENBERRY: Your Honor, counsellor is leading his questions—

THE COURT: Yes, Mr. Govar, this is your witness, don't lead the witness.

MR. GOVAR: Okay.

BY MR. GOVAR:

Q. Now, do you recall reviewing patient chart and medical records with Mr. Lucas prior to this year?

A. About, yes sir, I do.

Q. Let me ask you this, with respect to the ten patients we have been talking about during this trial, the patients reflected on Government's 2 through 11, how many times have you reviewed the files, charts and medical records pertaining to those patients?

A. More than once, maybe three times.

Q. Do you recall what information you had available to you the first time you reviewed the medical records with respect to those ten patients?

A. Seems like I have—reviewed—looked at the whole chart each time. I think—I think each time I have seen them, I have seen the whole chart.

Q. Alright, now, now Doctor Brinkley, ugh—these 703 forms would it be possible to effect—affect the classification of a patient by removing this first page and fixing another one to—and changing the information?

A. Sure.

Q. Now, I noticed that during Mr. Lessenberry's questioning he was using two phrases, skilled care and skilled care classification? Is there a different between those two in your mind?

A. Well there is some difference just in the usage of the words in order for a person to receive skilled care classification they would certainly be rendering skilled care nursing.

Q. Alright, now how many years have you been classifying medicaid patients under the Arkansas classification system?

A. Approximately fifteen.

Q. Approximately fifteen years?

A. Yes, sir.

Q. How many patients would you estimate or approximate that you have classified during those years? Medicaid patients?

A. I have reviewed and classified in excess of ten to fifteen thousand a year for that many years.

Q. Ten to fifteen thousand a year?

A. Yes, sir.

Q. Now do you have your nurses notes with respect to the patient Grayce Murray? Specifically nurses note dated 7/18/79?

A. 7/18/79? Yes, sir.

Q. What does it say?

A. Ambulatory to dining room, decided to leave, took a nap, ambulatory to church, ugh – services, ambulatory to church services.

Q. Alright, does it say anything about she decided to walk away from the nursing home later?

A. Said she decided to leave.

Q. She decided to leave?

A. That is all it says.

Q. May I see it a minute?

A. Yes.

Q. Will you show me where it says decided to leave?

A. Ambulatory to dining room, decided to leave, took a short nap – took a nap, ugh –

Q. The words decided to leave, does that indicate that she decided to leave the dining room or decided to leave the nursing home? Is that very clear?

A. I don't know.

Q. Well, you referred to—on some of these patients to ugh—drugs, specifically the patient Thomas Cassidy, and I have written down here the drugs, valium, that is a sedative isn't it?

A. Yes, sir.

Q. Drug formcene, that is a sedative isn't it?

A. Yes, sir.

Q. The drug visterel, that is a sedative isn't it?

A. Yes, sir, they are tranquilizers.

Q. Tranquilizers?

A. Yes, sir.

Q. If the patient is tranquilized enough, they don't require much care at all, do they?

A. That's correct.

Q. Well, this patient Mary Welch, did you see anything in those nurses notes and medical records that you went through that would change your opinion of what her classification should have been? As of August 1, or July 31st, 1979?

A. From the original classification that I had made?

Q. Yes?

A. It is the same as what I had previously, I would have classified her the same way as I had previously classified her.

Q. Now, Mr.—I am not going to belabor these points, I know we are running short of time, but there is some—a few things that we need to cover without going back through each patient. Now Mr. Lessenberry, as I recall asked you if you had ever discussed the criteria for classifying medicaid patients in nursing homes with Mrs. Huckaby, is that right?

A. Yes.

Q. Okay, and as I recall your response, she—you never talked to her about that?

A. I don't recall ever discussing this with Mrs. Huckaby.

Q. Do you recall her ever asking you about that?

A. I don't recall that, no sir.

Q. During the period of time that you were classifying these patients, were you available to nursing homes if they had questions about patient classifications?

A. I was available if they wanted to call me either where I—at the Social Services or in instances I have had nursing homes call me at my office to discuss situations with me.

Q. Okay. Did you have any other vendors or operators or nursing homeowners, call you and ask you questions about medicaid patient classifications?

A. I have in the past, yes sir.

Q. You have in the past? But you don't recall any such inquiries from Mrs. Huckaby?

A. No, I don't.

Q. Alright, now all those 703 forms which are marked as Government's Exhibit 2 through 11, which Mr. Lessenberry had you read from time to time, ugh—you determined the classification of those patients, did you not?

A. Yes, sir.

Q. And there is a letter written on the bottom page of each of those patient's 703 forms, is there not?

A. Yes, sir.

Q. And all those patients were upgraded to the classification of "B", is that correct?

A. If they had previously been "C" they were upgraded to "B", yes sir.

Q. Alright, now the information that was used to classify them as "B" patients was derived solely from this 703 form, was it not?

A. Yes, sir.

Q. Okay, at the time you made your initial classification decision, as to each of those patients, did you have quality medical records available that we have been talking about here today?

A. I did not have those records available to me.

Q. Okay, when you made the initial decision, you made it on the basis of the information on the 703 that was submitted, is that right?

A. Yes, sir.

Q. And that was as to each patient?

A. Yes, sir.

Q. Now, Mr. Lessenberry referred to Government's Exhibit 3 through 10, I believe that is these documents with the blue tags on them. How much weight would such a statement as those exhibits carry with you in classifying the patient?

A. Well, they would really carry no weight, ugh—because I don't use this information to make my classification.

Q. Oh, is that medical information?

A. This?

Q. Yes sir, is it nurses notes or doctor's orders or—

A. This is just a statement ugh—signed by the doctor and the administrator stating to some facts ugh—by them—

Q. Would it carry much or any more weight with you if the doctor who made those statements stated that he didn't know much about the medicaid classification system?

A. No.

Q. Now, Dr. Betton, Mr. Lessenberry in some of his very last questions to you, asked you if reasonable people would differ as to the classifications of patients, medicaid patients in nursing homes, is that right?

A. Yes, he asked me that, yes sir.

Q. Alright, now I want to ask you this question. During 1979, not just July and August, but the entire calendar year, was it up to people generally to classify medicaid patients in Arkansas nursing homes?

A. It was up to me.

Q. It was up to you?

A. Yes, sir.

Q. Oh, and you are a physician?

A. Yes, sir.

Q. Now, Dr. Brinkley, ugh—would it be safe to say from time to time the nursing home industry has disagreed with the classification system?

A. They have from time to time, yes sir.

Q. Alright, now let me ask you this because I think I—it is something that is in my notes and doesn't make a lot of sense. During the time that you were classifying patients in Arkansas, did you ever classify skilled care patients yourself?

A. Yes, sir.

Q. Did you in 1979?

A. Yes, sir.

Q. Was more information required for a skilled care patient than for a minimum or intermediate care patient?

A. No.

Q. No?

A. I did it from the same form?

Q. Same form?

A. Yes.

Q. Dr. Brinkley aren't those 703 forms supposed to reflect the most recent available medical information about that particular patient?

A. Well it should—should reflect the information at the time of the filling out of the form.

Q. Alright?

A. At the time that the form is dated.

Q. Well, maybe I am not making it clear. My question is really this? The nursing home submits 703 form at the end of July, 1979, developments with respect to a particular patient a month or two months back to that, don't have any relevance to that classification as of the date that form is submitted, does it?

A. Well, if I understand what you are saying, ugh—when this form—when this form is submitted, it is submitted filled out and it is dated and it is used in the classification process. The only time that we would use another form with other information is if an appeal process is started and new information was submitted.

Q. Let me get back to another point, I—when you initially reviewed the records of these ten patients that we have been talking about with Mr. Lucas, did you know any of those patients were approaching what you considered a reclassification later on?

A. Outside of the July/August time frame?

Q. Yes, sir?

A. Some of them did, yes sir. Some of them went on into a higher classification.

Q. Okay, but it was after August?

A. I think that we had some that did do this.

Q. Do you recall about how many out of the ten?

A. No, I don't.

Q. Dr. Brinkley, based on your experience as a doctor and your familiarity with the standareds governing the classification of medicaid patients in Arkansas during 1979, the integrity of the classification system depended on the accuracy of the information provided by the nursing home, did it not?

A. Yes.

THE COURT: Alright, anything else?

MR. LESSENBERRY: Yes.

RECROSS EXAMINATION
BY MR. LESSENBERRY:

Q. Doctor, all of these patients, these ten, have been well established received and were being considered to intermediate care, is that correct sir? There was no application for skilled care on any of these ten?

A. As far as I know there was no application for skilled on any of these ten.

Q. Yes, is the home required to send nurses notes or something in addition when an application for skilled care?

A. I think the procedure has now changed somewhat.

Q. Alright.

A. At that time on an initial routine classification period the 703 was submitted and if on the information on

the 703 it was determined that it was skilled care, then this changed the time frame of submitting more information for reclassification. I think then made them have to submit new information at ninety day intervals, I believe. Now, then there came a new procedure where the—the—Long Term Care Section would ask for nurses notes and information in addition to the 703. But this was after—this was up to the time that this procedure changed. Then it changed and now it is not the simple—if you are a skill patient care and you want to reclassification at skill, you have to submit a different type of information.

Q. Doctor, did you have an independent recollection of any of these patients at the time your reviewed from having reviewed at any other time in the past?

A. No, sir. I don't—don't remember any—anybody that I classified.

THE COURT: Anything else?

MR. GOVAR: No further question, Your Honor.

THE COURT: Dr. Brinkley, the Court has a question. When you devised this guideline in order to determine what classification a patient would be placed in, did you envision any subjectivity on the part of a nursing home operator in applying this to his or her particular situation?

THE WITNESS: I don't think I follow in those terms because the system was already in operation and all I did with this criteria was to streamline a criteria that was already in operation.

THE COURT: But that was on the federal level wasn't it doctor?

THE WITNESS: Well, we had a state criteria, we were—there was a federal level published guidelines that

we had to go by ugh—then we had to—each state was allowed to formulate its own criteria for its own long term care program. And this had been done for some time. But it was a cumbersome procedure in that it took more than two pages it took maybe three or four pages of filling out forms by the home, it took lots of paper on our part to arrive at a classification. All we did was to stay within the guidelines and streamline it to this point here.

THE COURT: Well, did you think that the nursing home operator should have had some input in the drafting of these guidelines? Did you solicit the assistance or—

THE WITNESS: On the input, no sir, I don't think we solicited their assistance, we did meet with them frequently. We had—

THE COURT: Before the guidelines were adopted? Or after the guidelines?

THE WITNESS: Well, the guidelines were—when the guidelines were decided upon then, the nursing home association had access to them to look at and if they had comments fine. Ugh—I think I minds were already made up at this time but we invited their comments and I think if there had been a significant—betterment of what we were doing, we were stopped and changed over.

THE COURT: Now after the guidelines were adopted, did you have a period of orientation where you could invite them and say—look gentlemen this is what we mean by hyperactive, this is what we mean by, lets see there was a term here that gave me some concern, dietary consideration, would be more complex than a regular diet, what does that mean to the average nursing home operator?

THE WITNESS: Well, to the average nursing home operator, this would ugh—this would mean a diet that was more complexed than what was cooked in the kitchen in

large quantities. At this time the Health Department has not pushed their program on dietary control into the nursing home field at that time. I am speaking of some thirteen or fourteen years ago. The State Health Department came along with the dietary guidelines and ugh—worked with the nursing homes very closely.

THE COURT: Alright, let me ask you—

THE WITNESS: We worked with the nursing homes mostly on the county level. The county directors worked with the nursing homes in addition to the liasion committee that was over the state level with the nursing home association. We meet at monthly intervals, these were things that were hashed about except it was not an official something that we were officially able to change at the moment but the liasion wanted to talk for the purposes of both parties.

THE COURT: How would you characterize this statement that I just read? On an objective level or subjective level and I will read it again. Dietary consideration would be more complex than a regular diet. How would you characterize that as an objective observation or subjective in character?

THE WITNESS: I think objective for instances, a richly protein type diet would be an objective and 1500 to 1800 calorie diabetic diet would be objective.

THE COURT: Then why didn't you set that out and say a 1500 calorie diet is complex. Do you not leave a nursing home director to guess at what you are talking about when you talk about ugh—dietary consideration would be more complex than a regular diet?

THE WITNESS: Yes sir, I think we did leave some doubt there about what we were talking about and why we did it, I don't know that was some years ago and I think that

happens to everybody that you grow as you stay in a program and try to get better all the time but I don't have a good answer for what why I did not use such and such at the time.

THE COURT: The problem is that we have a defendant who is criminally charged in violation dealing with the regulations.

THE WITNESS: Yes, sir.

THE COURT: Are you telling me that—that may not have been sufficient notice to her that she is violating this rule?

THE WITNESS: No, sir, I am not telling you that, because I think the nursing homes had a sufficient dialogue over the period of time, with their notes and accounting records and nurses, they had a tremendous bylaw directory prepared about all of these things in addition to our liasion committee which also helped them with this.

THE COURT: Alright, anything else from this witness?

MR. GOVAR: Yes Your Honor, I would like to clarify a point.

REDIRECT EXAMINATION
BY MR. GOVAR:

Q. Dr. Brinkley, it was the responsibility of the nursing home to fill out the 703 form based on their medical information, isn't that right?

A. It was their responsibility, yes sir.

Q. Alright, now on the portion of the 703 form, that portion of the 703 captioned degree of incapacity, was there any medical language on that form?

A. No, sir.

Q. If someone puts on a 703 form that a patient is bedfast and they are not, is that they—there is a distinction between those two, is there not?

A. Between being bedfast and not being bedfast?

Q. Yes, sir?

A. Yes, sir there is quite a distinction, yes.

Q. If someone puts on the form that a patient cannot walk alone and the medical records indicate that that person could, is that a complicated concept for one to grasp?

A. No, sir, it is an inaccuracy, I think.

Q. Do they need specialized medial training to make that distinction?

A. No, sir.

Q. Now, doesn't the 703 form itself especially under degree of incapacity provide for new answers, in other words, you don't have to check off one extreme or the other, there can be in between, can't there?

A. We tried to set this up so there were in betweens so that it could be checked off from one extreme to the other and in betweens.

Q. Wasn't there a liasion committee of the nursing home association that expressed the standards for classification of patients—medication patients with the Social Services Department when these standards were formulated?

A. Yes sir, at the time these were formulated there was.

Q. Okay. Now when you discuss a person's physical condition, at a given time, as a medical matter, that may be subject to some difference of opinion, is that not right?

A. Yes sir, it could be.

Q. But when you talk about care, that is actually given a person, which you have to physically do for them, that is not too hard to define or understand is it?

MR. LESSENBERRY: Your Honor, I think that is argumentative—

MR. GOVAR: Let me rephrase the question.

THE COURT: Well, I don't know, the Court may have very well prompted him to make this inquiry, this gives me a problem and I think he is working on it and I am going to overrule the objection. Go ahead.

BY MR. GOVAR:

Q. Under the state classification system, you were the person who was supposed to determine the classification and apply the standards, is that not right?

A. Yes, sir.

Q. Or those criterias?

A. Yes, sir.

Q. That was not the nursing homes function to do that was it?

A. No, sir.

Q. Their function was to provide you with a summary of information on this 703 form, is that not right?

A. Yes, sir.

Q. Then you—the exercise of your professional judgment would apply the standards and determine the classification of the patient, is that not right?

A. Yes, sir.

Q. No further questions, Your Honor.

THE COURT: Alright, anything else?

RECROSS EXAMINATION
BY MR. LESSENBERRY:

Q. Dr. Brinkley, defendant's Exhibit No. 11, that is the criteria was never prologated, was never adopted as any law or regulation of Long Term Social Services, was it?

A. That I don't know.

Q. Has it—do you see it in any kind of a publication or booklet that has been distributed by that agency to nursing homes?

A. I don't—this was distributed ugh—and it was part of—ugh—I am a little bit out of my field here, but I know that with—with the contract and agreement that nursing homes signed with the Department of Welfare and nursing home care, ugh—a copy of this would be attached that as a part of the contract.

Q. Do you know that as a personal—a matter of personal knowledge?

A. Yes, sir.

Q. You have seen that?

A. Yes, sir.

Q. Did you send one set to Cumberland Lodge?

A. I don't—I don't recall specifics but that was—that was the thing we were doing at that particular time.

Q. What is that particular time?

A. At that particular time would have been in the era of the early 1970's.

Q. You have seen that, but you have not seen it distributed to every nursing home?

A. I can't tell you that I have seen it distributed to specific people. I know that this was part of the procedure when contracts were signed. This was attached to the contract and was part of the contract package.

Q. Alright, doctor in 1979, or up until February 1 of this year, if I wanted to locate this thing, I wouldn't be able to find it in any kind of rule or regulation or any kind of published ugh—ugh—material either from Social Services or the federal government, would I?

A. I suppose you would have to call Long Term Care and ask for a copy. I would imagine.

Q. Thank you.

REDIRECT EXAMINATION
BY MR. GOVAR:

Q. Dr. Brinkley, did you know what all information is distributed by the Office of Long Term Care to nursing homes?

A. No sir, I do not.

Q. Let me ask you this, I am sorry, and I will sit down and shut up. During 1979, or at any other time that you can think of, based on your familiarity with the system, is there a single nursing home in Arkansas that was required to accept a medicaid patient?

A. I have no knowledge of that, no sir.

THE COURT: Alright, anything else, Mr.—

MR. LESSENBERRY: No, Your Honor.

THE COURT: Alright, you may set aside. Thank you. Call your next witness.